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KENTUCKY OPINIONS

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CONTAINING THE UNREPORTED DECISIONS

OF THE COURT OF APPEALS

COMPILED BY
J. MORGAN CHINN
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UNDER THE SUPERVISION OF
J. K. ROBERTS, Esq., of the Kentucky Bar, and C. M. McDONALD,
Esq., of the Mississippi Bar.

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KENTUCKY COURT OF APPEALS

JESSE MARATTA, ET UX v. WILLIAM H. RUBLE.

Wills—Devise Lost by Acts of Deceased.

Where a devise, is left open to a contingency, which may be performed by the testator, and he negligently performs it, by transferring the reversion to his own name, and devise is null and void as to the other legatees.

Same.

A testator devised to his grand-children certain property, with a right to make other investments equal in value, in lieu thereof, for their joint interest. Afterwards, he purchased lands with funds equal to the amount of the legacy, but took the title in his own name, and died without making further provision. Held to render null and void the legacy under the will.

Same—No Writing by Testator to Bind His Estate.

In the absence of a writing signed by the testator, and the convertance by him of their money into real estate, it operates as an ademption of their respective legacies, and leaves them no right to take under the will.

Same.

The devisees would only be entitled to the land, thus purchased by the testator, and not to a distribution under the will.

APPEAL FROM SPENCER CIRCUIT COURT.

May 17, 1871.

OPINION OF THE COURT BY JUDGE LINDSEY:

The land and personal property devised to William H. Ruble were charged with the payment of the legacies to the three young Housers, only upon the condition that the testator during his life time did not make investments for them equal in value to the respective amounts to which they were entitled, or if the investment was for their joint benefit, equal in value to the aggregate amount devised to the three legatees.

It is clear from the will itself that the testator reserved to himself the right to make such investment, and we think the proof in the record can leave no doubt but that when he purchased the tract of land from Holt, it was for the express

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purpose of making a proper investment of that portion of his estate he intended them to take under his will. He so expressed himself at the time of the purchase, and repeatedly up to the time of his death, and actually sold off a portion of the land to reduce its value to the amount he had provided that his grand children should take under his will. Appellants, however, insist that as he took the title of the tract of land to himself, and as he failed to change his will or to execute any writing whatever evidencing the purpose for which said land was bought, that it did not pass to the grand children under the will, but that so far as the same is concerned, their ancestor died intestate. If this be correct, (it being conceded, as it must be, that the testator bought the land for the grand children, and invested in it the money he intended them to have), then it is their title which fails, on account of not being evidenced by a writing signed by their grandfather, and the convertance of the money intended for them into real estate operates as an ademption of their respective legacies, and leaves no right to take anything under the will. William H. Ruble cannot be compelled to make good the devises to them, because the testator relieved the estate bequeathed to him of that charge, by making an investment for them himself, as he reserved the right to do, and if by reason of carelessness or negligence on the part of the grandfather, the grandchildren lose the land bought for them with the money set apart for their benefit by the will, it is their misfortune, and one for which William H. Ruble cannot be held responsible.

It is not pretended that the testator by converting into land the "money" devised to the three grandchildren intended or contemplated the ademption of their legacies, and as no such intention appears "from the will, or by parol, or other evidence" we are satisfied that it would do violence to the spirit and intention of section 1, article 3 of chapter 46 of the Revised Statutes to hold that the land into which the "money" devised was converted did not pass under the will to the three legatees. Wherefore the judgment of the court below is *affirmed*.

Bullock & Davis, for appellant.

Z. Wheat, for appellee.

Opinion of the Court.

NATHAN MUSGRAVE ET AL v. JAMES P. POWEL ET AL.

Courts—Reasonable Time to Comply With Mandate.

An opinion of the Appellate Court, revising a judgment below, implies that the litigant shall have a reasonable time to comply with the mandate, and discharge the order.

Same—Trial.

Ordinarily actions do not stand for trial at the term of the court at which a mandate of the Appellate Court, reversing a former judgment in the case, is filed.

Same—Process.

Nor can a decree thereon, in the court below, be entered until process is served on the litigants.

APPEAL FROM M'LEAN CIRCUIT COURT.

May 22, 1871.

OPINION OF THE COURT BY JUDGE LINDSEY:

By a former opinion of this court reversing a judgment of the court below, it was directed that upon the return of the cause, that unless either Sharp or Higden removed the lien held on the land by Griffith's executors, the contract of sale by Higden to the Powers should be rescinded, upon equitable terms. Such an order implied that the parties were to have a reasonable time within which to discharge said lien. Ordinarily, actions do not stand for trial at the term of the court at which a mandate of this court reversing a former judgment in the case is filed, but it seems that in this case the court proceeded at once to render a judgment rescinding the contract of sale to the Powers and enforcing the lien of Griffith's executors. Whether or not this fact of itself would be sufficient to authorize a reversal of the judgment by this court it is not necessary to decide, as the judgment must be reversed for another reason. It does not appear from the record, that either Sharp, the vendee of Griffith's executors, nor Higden, his vendee, were before the court by service of process, nor that either of them were parties to the former appeal. It was, therefore, erroneous to render a judgment at all, as the rights of the

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purpose of making a proper investment of that portion of his estate he intended them to take under his will. He so expressed himself at the time of the purchase, and repeatedly up to the time of his death, and actually sold off a portion of the land to reduce its value to the amount he had provided that his grand children should take under his will. Appellants, however, insist that as he took the title of the tract of land to himself, and as he failed to change his will or to execute any writing whatever evidencing the purpose for which said land was bought, that it did not pass to the grand children under the will, but that so far as the same is concerned, their ancestor died intestate. If this be correct, (it being conceded, as it must be, that the testator bought the land for the grand children, and invested in it the money he intended them to have), then it is their title which fails, on account of not being evidenced by a writing signed by their grandfather, and the convertance of the money intended for them into real estate operates as an ademption of their respective legacies, and leaves no right to take anything under the will. William H. Ruble cannot be compelled to make good the devises to them, because the testator relieved the estate bequeathed to him of that charge, by making an investment for them himself, as he reserved the right to do, and if by reason of carelessness or negligence on the part of the grandfather, the grandchildren lose the land bought for them with the money set apart for their benefit by the will, it is their misfortune, and one for which William H. Ruble cannot be held responsible.

It is not pretended that the testator by converting into land the "money" devised to the three grandchildren intended or contemplated the ademption of their legacies, and as no such intention appears "from the will, or by parol, or other evidence" we are satisfied that it would do violence to the spirit and intention of section 1, article 3 of chapter 46 of the Revised Statutes to hold that the land into which the "money" devised was converted did not pass under the will to the three legatees. Wherefore the judgment of the court below is *affirmed*.

Bullock & Davis, for appellant.

Z. Wheat, for appellee.

Opinion of the Court.

NATHAN MUSGRAVE ET AL v. JAMES P. POWEL ET AL.

Courts—Reasonable Time to Comply With Mandate.

An opinion of the Appellate Court, revising a judgment below, implies that the litigant shall have a reasonable time to comply with the mandate, and discharge the order.

Same—Trial.

Ordinarily actions do not stand for trial at the term of the court at which a mandate of the Appellate Court, reversing a former judgment in the case, is filed.

Same—Process.

Nor can a decree thereon, in the court below, be entered until process is served on the litigants.

APPEAL FROM M'LEAN CIRCUIT COURT.

May 22, 1871.

OPINION OF THE COURT BY JUDGE LINDSEY:

By a former opinion of this court reversing a judgment of the court below, it was directed that upon the return of the cause, that unless either Sharp or Higden removed the lien held on the land by Griffith's executors, the contract of sale by Higden to the Powers should be rescinded, upon equitable terms. Such an order implied that the parties were to have a reasonable time within which to discharge said lien. Ordinarily, actions do not stand for trial at the term of the court at which a mandate of this court reversing a former judgment in the case is filed, but it seems that in this case the court proceeded at once to render a judgment rescinding the contract of sale to the Powers and enforcing the lien of Griffith's executors. Whether or not this fact of itself would be sufficient to authorize a reversal of the judgment by this court it is not necessary to decide, as the judgment must be reversed for another reason. It does not appear from the record, that either Sharp, the vendee of Griffith's executors, nor Higden, his vendee, were before the court by service of process, nor that either of them were parties to the former appeal. It was, therefore, erroneous to render a judgment at all, as the rights of the

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parties could not be finally determined. Wherefore, said judgment is reversed, and the cause remanded for proper proceedings.

Little, for appellant.

Turner, for appellee.

E. CURD'S EXORS. v. JOEL H. CURD ET AL.**Bonds—Sufficiency of the Approval by Court.**

An order of court reciting appearance of an officer, who took the oath, etc., and "together with Curd, et al, his sureties, entered into and acknowledged a covenant to the Commonwealth," held a sufficient approval of the officer's bond.

Courts—Duties Tested by the Records.

Whether a court performed its duty, must be tested by the record, and not by extraneous evidence, and will be presumed to have done what the law imperatively required.

APPEAL FROM CALLOWAY CIRCUIT COURT.

May 9, 1871.

OPINION OF THE COURT BY JUDGE HARDIN :

This was an ordinary action against the appellants as the sureties of Moses Clayton, late a constable of Calloway county, on a covenant admitted to have been executed and acknowledged by them, together with Clayton, before the Calloway county court, as his official bond to secure the performance of his duties as constable.

After filing an answer presenting certain matters of defense and proceeding to trial thereon, the defendants asked and obtained leave to file an amended answer, which they did, alleging in effect that although they signed and acknowledged the bond, it was not obligatory upon them, because the county court failed *to approve* and accept them as sureties as required by law (*R. S. Chap. 20, Art. 1, Sec. 2.*)

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With other evidence adduced on the trial by the plaintiffs, was an order of the county court of the same date as the bond, in these words: "This day Moses Clayton produced in court a certificate of his election to fill the office of constable for the first district in this county, and thereupon he took the oath required by the Constitution and laws of this State, and together with Joel H. Curd, Robert Boggs, James C. Newport, Gabriel Smith and Richard Grogan, his securities, entered into and acknowledged a covenant to the Commonwealth of Kentucky conditioned according to law."

Construing this order as insufficient to prove the approval and acceptance by the county court, of the defendants and others, as the sureties of Clayton, the court instructed the jury peremptorily to find for the defendants, which they did accordingly; and this decision being properly excepted to, is now complained of as error, for which the judgment rendered in accordance with the verdict, should be reversed by this court.

Waiving the question whether, as the appellees admitted the due execution and acknowledgment of the bond by them, and that Clayton thereupon qualified as constable, they are not estopped to deny that the bond was obligatory upon them, at least as a common law covenant, we are of the opinion that the order of the county court sufficiently imports the *approval* of the sureties in the bond as required by law.

While it is true that the question whether the county court did its duty or not, must be tested by the record, and not by extraneous evidence, yet this court will, in accordance with a general rule, presume that it did what the law imperatively required, if the record conduces to that conclusion and contains nothing inconsistent with it (*Commonwealth v. Pullam*, 3 Bush, 47). This case is not analagous with that of *Fletcher, &c., v. Leight, Barret & Co.*, 4 Bush, 303, in which it was said by this court: "There being no record evidence that the bond, as executed, was ever approved by the court, nor that the securities who did sign it, were approved, but the only order shown *negating this*, the decision of the court upon the issue of no record, and his peremptory instruction to the jury were both erroneous.

But in this case, although the order of the county court does not state, in express terms, that the sureties were approved, and the bond accepted, there is not only nothing in the order repug-

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nant to that conclusion, but no other inference can be fairly deduced from it.

The peremptory instruction given was, therefore, erroneous.

Wherefore, the judgment is reversed, and the cause remanded for a new trial, and other proceedings not inconsistent with this opinion.

Brown & Miller, for appellant.

Stubblefield, for appellee.

J. GUTHRIE COKE v. J. ALLEN PORTER, ET AL.

Pleading—Petition Alleging Action on Supersedeas Bond.

A petition, alleging the execution of a supersedeas bond, and all facts of its course through the Appellate Court, constitutes a good cause of action.

Same—Demurrer.

A demurrer to such petition should be overruled.

APPEAL FROM JEFFERSON CIRCUIT COURT, C. P.

May 1, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

It is alleged in the petition of appellant that appellee covenanted in the bond sued on that Porter & Brooks would pay to appellant *all costs and damages* that might be adjudged against them on the appeal, that they would satisfy, and perform the said decree in case it should be affirmed, and any judgment, or order, which the Court of Appeals might render, or direct the inferior court to render, &c.

A copy of the supersedeas bond is filed, which is made the foundation of the action, containing the covenants substantially as recited.

And it averred that on the 17th of November, 1869, that the

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Court of Appeals adjudged that there was no error in the judgment appealed from, that the same be affirmed, and that the appellee in said appeal recover from appellant ten per cent damages on the amount superceded, that the amount superceded was \$1,687.48, being debt and interest up to the 2nd of February, 1869, and 33 85-100 costs; that ten per cent damages amounted to \$172.20, to which he was entitled by reason of said affirmance, and judgment of the Court of Appeals, which was then due and unpaid, and for which he prayed judgment.

The covenant on the part of appellees to pay such damages as this court might adjudge in the appeal in case of affirmance, that the judgment was affirmed with ten per cent damages on the amount superceded, the precise amount of the damages, and he non-payment thereof, are all distinctly set forth in the petition. The covenant and the breach are well pleaded, and a good cause of action set forth in the petition, and consequently the demurrer to it should have been overruled. Wherefore, the judgment is *reversed*, and the cause is remanded, with directions to overrule the demurrer to the petition and for further proceedings consistent with this opinion.

Arbegust, for appellant.

Stratton, for appellee.

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T. C. COLEMAN v. WILLIAM ROSS ET AL.

Lis Pendens—Attachment—Another Suit Pending.

Where, in an attachment proceeding, a defendant answers, admitting owning property referred to in another suit pending against him, this is held sufficient to constitute a *lis pendens* under the attachment.

Laches.

An answer filed to an attachment suit three months after service of process, and the cause submitted in six months, held not laches.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHY. DIV.

May 24, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

After the recovery of a judgment by appellee against George W. Warnack and a return of *nulla bona* by the proper officer on an execution issued thereon, this suit in equity was instituted by appellee against Warnack and others under *Sec. 474, Civil Code*, for the discovery of any money, choses in action, equitable, or legal interests, and all other property to which said Warnack was entitled, and to subject the same to the satisfaction of his judgment. On the filing of the petition four copies of the summons with attachment endorsed as the clerk certifies issued, with the marshal of the Louisville chancery court returned, executed on John Barks, February 20, 1869; on John McBrayer, March 1, 1869; on E. D. Force, March 5, 1869, by delivering to each a copy, and George Warnack absent from the city.

May 21, 1869, the defendant Warnack filed his answer, in which, after stating that the debt was created by a bill drawn by one Fletcher, accepted by him, and payable to and endorsed by appellee, for the accommodation of said Fletcher, who received the whole of the money, and that appellee and himself were the joint sureties of said Fletcher on said bill, to enable him to raise money, and that he was only liable to appellee for one-half of said debt, according to a verbal agreement made by Ross and himself at the time said bill was drawn and accepted. He avers that he owns the property mentioned in the decree of this court (the Louisville chancery court), in the case of J. Burks, &c., against

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him, or the equity of redemption therein, except the household and other personal property, which was sold by the marshal of this court; and has no other property, that he is engaged in the business of commission merchant in partnership with Robert H. Love, which yields an annual income to him of about \$1,200, but he has no capital in the firm, and is indebted to it in the sum of \$639.74; that he has an open account on one George O. Tuck for \$6,465.67, which he considers worthless, said Tuck being insolvent.

The record shows that on the 2nd day of July, 1869, the cause was submitted, and on the 18th of September following appellant moved the court to allow him to file his petition, and that the motion was set for hearing on the 20th of the same month, but it does not appear in the record that the motion was ever heard, and no order appears to have been made in the case until the 20th of December, when two exhibits were filed by defendant, and on the 4th of February, 1870, the cause, on motion of *defendant*, was submitted; on the 11th of the same month Coleman moved to file his petition *nunc pro tunc* as of the 28th ult., and on the same day it was ordered that the case of John Burks, guardian, against G. W. Warnack, No. 22,328, be heard with this. Still no leave appears to have been given Coleman to file his petition, nor is there any order noting the filing of it; but a paper is copied into the record purporting to be the petition of T. C. Coleman, in which it is alleged that he disputes the validity of the attachment set up and relied upon in this suit, as claimed to have been levied upon a parcel of land, which he described by metes and bounds, and avers contains $22\frac{3}{4}$ acres and claims that he had purchased said land.

That in an action of himself against G. W. Warnack, &c., he recovered a judgment against him, upon which he sued out an execution directed to the sheriff of Jefferson county, who levied it on the $22\frac{3}{4}$ acres of land above described, that on a return of said execution a *venditioni exponas* issued, by virtue of which said land was sold, and he became the purchaser thereof. That he is advised that William Ross claims to have a lien on said land by virtue of an order of attachment issued in the suit of himself against Warnack, which appellee alleges, the marshal of said court levied on said land, but he denies that the marshal ever made sufficient levy on the land, and concludes with a prayer that

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the court set aside the return of the marshal on the order of attachment, and adjudged his, the superior claim to the land.

The court below after having rendered judgment in favor of Coleman, set it aside, on a petition for a rehearing, and subjected the land to the payment of Ross' debt, and from that judgment Coleman has appealed.

As the parties treated appellant's petition as properly filed, and as constituting a part of the pleadings in the case in the court below, this court will regard all irregularities as waived, and proceed to consider and dispose of the case on its merits.

Although Warnack refers to the lands he owned in his answer, as being properly described in the suit of J. Burks, &c., against him, and by referring to that suit appellee could have ascertained precisely what lands he had mortgaged, and that the $22\frac{3}{4}$ acres were not encumbered, still the original petition was never amended.

We do not regard the marshal's return on the attachment as showing that he had levied on the same land, it is wholly insufficient for that purpose; and the only question is, whether appellee had a *lis pendens*, at the time appellant's petition was placed in the papers of the suit, for if he had not the judgment cannot be sustained.

By appellee's petition, which was filed some months before the execution of appellant's issued, he called on the debtor Warnack to discover what choses in action, money, and property he had. In his answer, Warnack by reference to the decree in a suit in the same court discloses that he has this land.

Certainly if he had in that answer, stated in direct terms that he owned $22\frac{3}{4}$ acres of land, describing its location, the court could have rendered judgment, and would have been authorized to have subjected it to sale, under the *section of the Civil Code supra* to pay appellee's debt.

Warnack was the owner of the land at the time the petition for a discovery was filed, and it was subject to his debts, there was a *lis pendens*, to reach it in the mode pointed out by law, and to that litigation appellant sought to be made a party after the discovery had been made sufficient to authorize a judgment, and that too after the cause had been submitted on final hearing.

The original petition was answered by Warnack within three months after it was filed, the cause submitted in less than six

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months, and appellee entitled to judgment before appellant's execution was levied on the land through which he claims title.

There was no laches in the prosecution of the suit, certainly none such as to perfect any rights acquired by the institution of the suit, and the discovery though indirect was as effectual for the purpose of the suit as if it had described the land in language direct and positive.

Perceiving, therefore, no error prejudicial to appellant, the judgment must be *affirmed*.

L. S. Hardin, for appellant.

Bann & Goodloe, Humprheys, for appellee.

WILLIAM TURNER v. D. C. TABB, TRUSTEE, ET AL.**Evidence—Entry on Books Made by Employee.**

Entries by an employee made on the books kept by him can be used to establish a liability for an increase in salary given him by his employer.

Master and Servant—Employer and Employee.

An employer is liable under a parol agreement for an increase in salary of his employee, where his books show the entry made thereon by the employee, and not objected to by him.

Same—Due Care in Acts of Employee.

A manager of a business, who negligently or by lack of due care, permits one of his sub-employees to overdraw his wages, is personally liable to the employer for same.

APPEAL FROM LOUISVILLE CHANCERY COURT.

August 18, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

G. B. Tabb being a merchant of Louisville, employed appellant as his clerk in February, 1861, at the fixed salary of \$1,250 per

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year. Appellant so continued as clerk under Tabb's supervision until in April, 1863, when Tabb having become obnoxious to the military authorities, then commanding Louisville, he was by their orders sent through their military lines to the Confederacy.

Preparatory to leaving, G. B. Tabb, April 29, 1863, conveyed his property, merchantable stock, &c., to his brother, D. C. Tabb, in trust for his mother, both of whom resided in West Virginia, and left the store under the control of Turner.

In 1864 and 1865, Turner wrote various letters to G. B. Tabb insisting on an increase of wages, as those agreed on were inadequate. There is no response to these letters found in the record.

D. C. Tabb seems to have been at Louisville on only one occasion during the whole time which Turner controlled the mercantile house.

G. B. Tabb got permission to return to his relatives in West Virginia and Maryland, where he continued to reside until his return to Louisville in the year 1866, where he resided until his death in June, 1867, and controlled the business house in the mean time.

Turner sued the trustee, D. C. Tabb, for salaries, fixing those of 1863 at \$1,500, 1864 \$2,500, and from June 3, 1867, to January 1, 1868, at the rates of \$2,500. As to the other period there is no controversy, but as to these the trustee insists he is only liable for \$1,250 for 1863, \$1,500 for 1864, and at the rates of \$2,000 from June 3, 1867, to January 1, 1868.

The character of the correspondence between Turner and G. B. Tabb, his taking control of the business after his return to Louisville, the entire absence of correspondence by D. C. Tabb, and non-interference during all this time with the management of the business, leave but little room to doubt that G. B. Tabb was the recognized managing agent on the part of the trustee, if indeed the property was really not held in secret trust for him, at least during his life. The original contract price of the amount of Turner's salary is not doubtful, but whether afterwards an advance was not agreed on, is more problematical. In some of Turner's letters to G. B. Tabb his intention to quit unless an increase of salary was allowed is made clear and distinct.

It is proved by C. F. Turner that after G. B. Tabb returned to Louisville the following entries to Mr. Turner's credit were made on the books, by him, by the direction of said Tabb and per his agreement with Mr. Turner:

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From February 15 to December 31, 1861, 10½ months..	\$1,093.75
For 1862	1,250.00
For 1863	1,500.00
For 1864	2,500.00
For 1865	2,500.00

The profits made by William Turner in the management of the business, the previous claim for increased wages together with future services may all have entered into the consideration for this agreed increase for past as well as future services.

Although there are some apparent discrepancies in C. F. Turner's statements, yet as considerable periods of time had elapsed, and his attention was not directed to these for explanation, and inasmuch as a reasonably liberal construction would make them substantially harmonize, and as no other attack upon his credibility has been made, his evidence should not be disregarded because of these things. We think, therefore, that the charges and entries as found upon the books and so established by C. F. Turner, should be allowed.

But as C. F. Turner was allowed to overdraw his wages and is probably insolvent and this was through the want of due care by William Turner whilst he had the control and management of the establishment, he should be held responsible therefor, and this amount should be deducted from the sum found to be due him for services.

We agree with the chancellor as to the remaining questions, and find only these errors in his judgment.

Wherefore, the judgment is reversed, with directions for further proceedings in accordance with this opinion.

Gazlay, for appellant.

Bullitt, for appellees.

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COMMONWEALTH v. ROBERT KEITH.

Indictment—Sufficiency When Taken as a Whole.

The preamble and body of an indictment must be construed together, and if they show with certainty to a common intent that a felony was committed, it is sufficient.

APPEAL FROM PENDLETON CIRCUIT COURT.

August 18, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The indictment when taken altogether shows the charge to be that of malicious shooting and wounding another with the felonious intent to kill. The body of the indictment and the averments leave no room to doubt the character of the offense charged; the preamble to the indictment is not so direct, specific and certain. It accused the defendant "of the crime of wilfully and maliciously shooting at another with intent to kill, committed as follows," and proceeding then with the specific averments as to time, place and manner of perpetrating the offense. The preamble and the body must be taken together, and if these show with certainty to a common intent that a felony was perpetrated it is sufficient. *Burns v. Commonwealth*, 3 Met., 14. The judgment dismissing the indictment is therefore reversed, with directions for another trial and *revire de novo*.

G. Duncan, for appellant.

Rankin & Hamilton, for appellee.

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JACOB MORSE v. ROBERT C. BOYD ET AL.

Evidence—Facts de Hors an Entry Under a Patent.

Where it appears upon the face of a patent that it is illegal, it may be considered null and void, but evidence of a fact de hors the patent is inadmissible in a collateral proceeding to avoid or defeat it.

APPEAL FROM CALDWELL CIRCUIT COURT.

May 11, 1871.

OPINION OF THE COURT BY JUDGE WILLIAMS:

This action of ejectment was brought to recover the possession of certain lands claimed to be covered by a patent issued to William Leavis on the 11th day of June, 1807, upon a certificate of entry bearing date of — day of February, 1802. The appellant claimed under a patent issued to Cornelius Merry on the 25th of August, 1806, on a certificate of entry bearing date the — day of November, 1804. The agreed facts in the record show that both patents aver the land in controversy. Upon their faces, both patents seem to have been issued under the provisions of “an act for settling and improving the vacant lands of this Commonwealth,” approved December 20th, 1800. There can be no doubt but that the title of the Commonwealth to the land covered by the same passed to the patentee by the patent issued to Merry, and that under the same he and his vendees can hold as against the world so long as the patent remains in full force, unless it is void.

Upon its fact it does not appear to be void, and in a contest between those holding under Merry, and those claiming under a junior patent its validity cannot be questioned. In the case of *Bledsoe's Devises v. Wells, 4th Bibb, 330*, this court held that when it appears upon the face of a patent that it is illegal, it may be considered void and treated as a nullity, but that evidence of a fact *de hors* the patent was inadmissible in a collateral proceeding to avoid or defeat it. The fact appears from the face of the Travis patent that his, which was the older entry, covers a portion of the land patented to Merry. This fact in a direct proceeding to vacate Merry's patent to the extent of the land so averred might

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be sufficient to entitle those who claim under him to relief, but according to the doctrine in case of *Bledsoe's Devisees v. Wells*, which has been frequently referred to in terms of approval by this court in subsequent cases, such a fact was inadmissible to impeach it in this proceeding.

The judgment against appellant, Morse, must therefore be reversed. The cause is remanded, with instructions to dismiss appellees' petition as to him.

Marble, for appellant.

Hewlett, for appellee.

C. G. WALLACE ET AL v. DAVID BOYLE.

Highways—Street Improvement, Regrading and Filling.

Property owners cannot be held liable for a claim for regrading and filling a street, where the claim embraces work done in excess of that authorized by the original ordinance.

Same.

Nor under neither of the acts of February 24, 1865, and of 1867, is the owner liable, where he not only received no benefit from the street improvement, but is damaged thereby.

Municipal Corporations—Ordinances—Constitutionality.

The constitutionality of a local ordinance for street improvement depends upon the fact, that the party whose property is taken for public benefit, receives compensation in some degree in the enhancement of the value of his remaining property.

Same—Authority of City Council by a Subsequent Ordinance.

Property owners along a street upon which improvement is done cannot be compelled to pay the expense therefor, by a subsequent ratification by the council of the action of the officers.

APPEAL FROM KENTON CIRCUIT COURT.

May 22, 1871.

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OPINION OF THE COURT BY JUDGE LINDSEY:

The work on Third street was done under an ordinance providing for the regrading and macadamizing of the same, in a certain and specific manner, under the superintendence of the city engineer and the committee on internal improvements. The evidence shows that under the direction of said engineer and committee the contractor not only regraded and macadamized the street, but made a fill raising the same from 3 to 3½ feet throughout the entire extent of the improvement. The ordinance certainly did not contemplate that any such fill should be made. It is true it uses both the terms "regarding" and "filling," but uses them as synonymous. But when we come to examine the ordinance receiving the work and providing for the payment of the cost of the same, the council seems to have recognized the fact that the engineer and street committee misunderstood the meaning of the original ordinance and caused the contractor to make improvements not authorized by the same, and this last ordinance requires the lot owners to pay not only for regrading and macadamizing but for "filling" said street. That the original ordinance did not authorize any such "fill" as that made by the contractor is, we think, clear, and in this conclusion we are fortified by the fact, that the work as done, instead of enhancing the value, is an absolute injury to the lots abutting on that portion of the street so improved, as the street is from 8 to 15 feet higher than said lots. Under the charter of the city, the council may provide for the improvement or repair of the streets of the city, and in proper cases, may have the same improved or repaired at the cost of the lot owners, but we do not conceive that the city engineer and street committee can have work done without authority from the legislative department of the city government, and that property owners whose lots front on the streets upon which such work is done, can be compelled to pay the expense thereby incurred by a subsequent ratification by the council of the action of said officers. *Hydes & Goose v. Norwood, &c., 4th Bush, 464.* We are of the opinion that in this case the contractor must look to the city for at least a portion of his pay, and that the property of the appellants cannot be subjected to the payment of his claim in so far as it embraces work done in excess of that authorized to be done by the original ordinance. Whilst it is true that the act of February

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24th, 1865, gives equitable powers to the court to ascertain what portion of the cost of street improvements made in the city of Covington has been incurred on account of work done by authority of law, and to hold the lot owners responsible for the amount so ascertained, and that the act of 1867 authorized for such purposes a tax to be imposed upon the lot owners, equal to one-half the value of the lots fronting the improvements, yet we conceive that neither of these acts can be enforced in cases in which the taxpayer not only receives no benefit whatever from the improvement, but is damaged thereby. The constitutionality of such local taxation depends upon the fact, that the party whose property, or money, is taken for the public benefit, receives compensation therefor in some degree in the enhancement of the value of his remaining property. In this case the evidence tends strongly to the conclusion that the property of the parties taxed has been absolutely damaged by the work done, upon the street, and if this be true, it would be a monstrous outrage to compel them to pay the cost of making the improvement, by which their property is impaired in value. Upon the return of the cause they should be allowed to amend their pleadings and raise this issue in case they see proper to do so, and both parties should be given reasonable time within which to take additional proof. For the errors pointed out the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Menzies & Furber, Benton, for appellant.

Baker, Fisks, for appellee.

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HENRY MOORE v. V. DAVIS.

Judgment—Correction of Mistakes in.

Courts will, by proper proceeding, correct mistakes innocently made by parties in the settlement of their accounts.

Same.

A judgment against a defendant, who did not resist the action, cannot be revised for alleged mistakes, in a separate action, and resulting from the plaintiff's own lack of diligence.

APPEAL FROM JEFFERSON CIRCUIT COURT, OHY. DIV.

May 1, 1871.

OPINION OF THE COURT BY JUDGE LINDSEY:

The petition in this cause discloses upon its face that the amount sought to be recovered is part of the rent claim which constituted the cause of action in another suit between the same parties, in which a judgment was rendered in favor of the appellee without resistance on the part of appellant for the full amount claimed. It is alleged, however, that by mistake of the appellee's attorney, but without any fault whatever upon the part of the appellant, a credit of fifty dollars was erroneously entered upon the account sued on before judgment, and hence that the judgment was for a less sum than was really due. And appellee seeks to be relieved against the consequences of his own mistake, by a second judgment for the balance still claimed to be due.

Courts will in proper proceedings correct mistakes innocently made by parties in the settlement of their accounts. They will correct judgments erroneously entered when there is anything in the record from which the correction can be made, also when the judgment was procured by fraud, or where it was rendered for less than was due, by reason of the mistake of the plaintiff superinduced by anything done by the other party, or even when both parties are innocent of intentional wrong, when the mistake was such as could not have been discovered by the use of reasonable vigilance. But it is a general rule that the judgment "of a court of competent jurisdiction, is not only final as to all matters deter-

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mined by it, but is also * * * final as to every other matter incident to the cause and which the parties might have put in issue and had litigated." This rule is founded in reason and propriety. It imports only the exercise of reasonable vigilance; tends to advance the ends of justice; to quiet the contentions of society, and to put an end to vexatious litigation, "*Talbott v. Todd, 5th Dana, 193.*"

Tested by this rule it seems to us the petition presents no cause of action. The amount in controversy might and ought to have been recovered in the former action, and if the appellee or his attorney had exercised reasonable vigilance, no mistake would have occurred. The demurrer to the petition should have been sustained, and as the evidence in the case shows that it cannot be so amended as to present a cause of action the judgment is reversed and the cause remanded, with instructions to dismiss the proceeding.

Dembitz & Wehle, for appellant.

Eastin, for appellee.

 C. B. SANDERS v. WILLIAM HYFIELD.

Officers—Town Marshal—Salary—Attachment.

The salary of a town marshal is not subject to attachment on a return of no property found.

APPEAL FROM JESSAMINE CIRCUIT COURT.

December 21, 1889.

OPINION OF THE COURT BY JUDGE PETERS:

Appellee, a creditor of appellant, with an execution against his estate, and a return of no property found, sought by this proceeding to subject a portion of his salary due to him from the board of trustees of Nicholasville for his services as marshal of said town

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to the satisfaction of the debt, and the only question in the case is can this claim under *Sec. 474, Civil Code*, be subjected in equity to the payment of said debt.

This case in analogy, and principle, is the same as the cases of *Webb v. McCauley*, 3 *Bush*, 8, and *Divine v. Harvie*, 7 *Mon.*, 439, and for the reasons therein stated the claim, or demand of appellant is not liable to attachment, and appropriation as sought to be made.

Wherefore, the judgment is *reversed*, and the cause remanded, with directions to dismiss appellee's petition so far as it seeks the unpaid salary of appellant as marshal of said town to be applied to the payment of his debt and for further proceedings not inconsistent with this opinion.

Messick, for appellant.

Brown & Pryor, for appellee.

COLEMAN HICKS v. HENRY DUGGINS.**Officers—Constable—Execution—Levy and Sale—Fi Fa Sufficient.**

Appellee as an acting constable levied an execution on some lumber and furniture owned by appellant who brought this action of trespass against the constable for so doing. Held, that the fi fa which is pleaded was a sufficient justification without producing the judgment upon which it was founded.

Recognition of Officer.

As appellant recognized the appellees' official character and right to levy on the property, the nonproduction of his official bond and oath of office, is not reversible error.

Exemptions—Personal Property.

Lumber and materials of a cabinet maker, in his possession, are not exempt from levy under the statute.

Misnomer—Execution—Trespass.

The frame of a press, levied on by a constable, calling it a wash-stand, and sold for benefit of defendant, cannot constitute a trespass.

APPEAL FROM GARRARD CIRCUIT COURT.

January 14, 1870.

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OPINION OF THE COURT BY JUDGE WILLIAMS:

Duggins, an acting constable with an execution in his hand, levied it on some lumber and unfinished furniture of Hicks, who seems to have been a cabinet maker, and having sold it at a very small price, this action of trespass was brought against the constable for so doing.

The *fi fa* under which he sold is pleaded as a justification and that was sufficient for him without producing the judgment of the court upon which it was founded. As no specific allegation was made by the plaintiff that he did this thing under mere color of office without any right thereto, and inasmuch as the plaintiff recognized his official character and right to levy on the property, by soliciting that it be left with him to finish in order to make it bring more, and promising to have it forthcoming to satisfy the execution, and as the execution and returns and evidence show he was acting in the character of constable, the non-production of his official bond and oath of office, is no reversible error.

The lumber and materials being the property of the defendant in the execution were not exempt from levy by any statute known to us. Nor does public policy regarding the just rights of creditors, as well as debtors, forbid the levy and sale of such property.

The frame of a press was levied on by the constable, calling it a wash-stand, still as it was sold and the defendant got the benefit of the sale, its misnomer by the constable, could hardly constitute a trespass.

Wherefore, the judgment is *affirmed*.

Bradleys, for appellant.

Owsley & Burdett, for appellee.

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WILLIAM HAYS' EXR. ET AL V. THOMAS MACKIN.

Corporations—Turnpike Company—Subscription to Capital Stock—Conditions as to Use of Money Subscribed.

Appellee upon a return of *nulla bona* on an execution against the Maxville, &c., Turnpike Company brought this suit in equity, making appellants defendants as garnishees, and calling on them to state what amount they owed on their subscription to the capital stock in the company. They answered, and denied they owed anything, as their subscription of given amounts of stock were conditioned that it was to be laid out upon that division of the road on which they lived and that the appellee was a contractor on another division, and they denied the right to appropriate their subscription otherwise than upon the condition set out. These allegations were not denied. Held, that as the road company could not sue and receive of the garnishees the amounts of their various subscriptions to be laid out on other divisions of the road, so a contractor on such other division could not recover from them.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 21, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellee having obtained a common law judgment and having a return of *nulla bona* on execution against the Maxville, Willisburg & Beechfork Turnpike Road Company, then brought this suit in equity, making appellants defendants as garnishees, and calling on them to state what amount they owed as subscribers of stock in said company.

They answered, and denied they owed anything, as their subscription of given amount of stock were conditioned that it was to be laid out upon that division of the road upon which they lived, known as the lower division, and that said division had not been completed, and that all they and the other subscribers in said division had subscribed would not complete it; that the plaintiff was a contractor on another division of the road, and not upon this one, and was to take the subscriptions in said division, and they denied the right to appropriate their subscriptions otherwise than upon the conditions set out. The treasurer of the company

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was made a defendant; he answered and set out the various subscribers and their indebtedness, and says the road was divided into three precincts or divisions; the terms of subscription were that the several amounts subscribed were to be laid out on that division of the road in which the respective subscribers lived, and not on the others.

There is no evidence controverting the statements of these garnishees; hence, their responsibility depends on the statements of their several answers.

As the road company could not sue and recover of these garnishees the amounts of their various subscriptions to be laid out on other divisions of the road, so a contractor of work, on such other divisions, could not recover from them to pay for such work.

As these appellants lived in the lower or third division of the road, they had a right to subscribe upon conditions that the amount so subscribed should be appropriated to the completion of their division, and as their subscriptions were received upon such conditions, neither the corporation nor any of its creditors have a right to alter the contract. Whatever might be the rights of a judgment creditor for work on their division of the road, a creditor for work on other divisions has no right to garnishee them.

Wherefore, the judgment is reversed, with directions to dismiss the petition against them.

Judge Hardin not sitting.

Hays, for appellant.

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JAMES HAMMOND v. NELSON McCORD.

Contracts—Principal and Agent—Personal Responsibility of Agent for Contract Made for Principal.

Appellee as agent of McAlter & Co., purchased tobacco from appellant agreeing to retain the tobacco in his possession as security for the price due appellant, but afterwards forwarded the tobacco to McAlter & Co. And the appellant brought an action to recover against the appellee, personally. Held, that the agreement to hold the tobacco as security to the appellant imposed on the appellee a personal obligation to hold it subject to the debt.

APPEAL FROM FLEMING CIRCUIT COURT.

January 15, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellee, acting as agent for McAlter & Co. in the purchase of tobacco, in Fleming county, having bought and received of the appellant 2,455 pounds of tobacco, at the price of \$12 per hundred pounds, for the purpose of assuring payment to the appellant, executed and delivered to him the following writing:

“March 18th, 1868. Received of James Hammond 2,435 pounds of tobacco for McAlter & Co., but it is understood that Hammond holds the tobacco until he gets pay for it. By Nelson McCord, agent.”

From intrinsic evidence it appears that at the time of the execution of the above writing McCord promised the appellant to retain the possession of the tobacco as security for the price due him, till the same should be paid, but although part of the debt remained unpaid, he afterwards forwarded the tobacco to McAlter & Co. in another county.

And the appellant brought this action to recover against the appellee, personally, a balance of the price of the tobacco, and the circuit court having dismissed the petition, the plaintiff has appealed to this court.

The precise scope and terms of the appellee's agency, beyond a mere authority to buy and receive tobacco, not being shown, it does

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not appear whether he was authorized to pledge the tobacco, or create a lien upon it, or not.

But it is insisted for the appellee that his agency being apparent from the contract itself, it should be presumed that he did not exceed his authority. Whether this be so or not, with reference to a contract importing only an agreement of a principal made through his agent, if the deduction is authorized, from the contract, that the appellee undertook personally to retain the tobacco as security for the appellant's debt, he is individually liable, although his agency was disclosed (*1 Parsons on Contracts, 65*).

The manifest object of the agreement was to give to appellant a security for his debt, for which McAlter & Co. were already bound; but if the stipulation to retain the tobacco in the appellee's hand was only *their* undertaking, and imposed no responsibility on *him*, and left him free to defeat the object of the contract by sending the tobacco away, it is difficult to perceive what benefit was secured to appellant by the agreement, for on the removal of the tobacco, his remedy would only be, what he had at first, a right of action against McAlter & Co. But such is not our construction of the contract. On the contrary, it was intended, in our opinion, thereby to impose on the appellee a personal undertaking to hold the tobacco subject to the debt.

It results, therefore, that the court erred in dismissing the petition.

Wherefore, the judgment is reversed, and the cause remanded, with directions to render a judgment for the plaintiff.

Cord, for appellant.

Cox, for appellee.

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JOHN V. GRIGSBY v. JAMES P. LOCKNANE.

Contracts—Construction.

Appellee sold to appellant fifteen beef cattle, to be paid for at the same rate per pound which other seven cattle owned by appellee, would bring in the Covington market and which were to be started the next day to that place. The cattle were not started on the 17th, but 20th and arrived at Covington on Saturday evening, 21st of December. The market was dull and low when appellee reached Covington, and he withdrew his cattle from the market until a more favorable time to sell. Held, that the appellee could not increase appellants responsibility for the fifteen head by withdrawing the seven from the market to await better prices.

APPEAL FROM CLARK CIRCUIT COURT.

January 20, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

December 16, 1867, appellee sold to appellant fifteen beef cattle, to be paid for at the same rates per pound, gross, which other seven cattle owned by appellee, would bring in the Covington market, and which were to be started the next day to that place. The cattle were not started on the 17th, but on the 20th, and arrived at Covington Saturday evening, 21st of December. It ordinarily took from two to four days to get beef cattle through from Winchester to Covington, the parties residing near the former place.

There were two sale days per week in the Covington market, Mondays and Thursdays, the current market rates being for currency and not gold and silver.

The market was dull and low when Locknane reached Covington, consequently he withdrew his cattle from market and sent them to the country to feed until a better state of market should recur, and did not sell until January 2, and then on thirty days' time.

Grigsby insists that he is only responsible for the market price of such cattle as the seven of Locknane, on the first market day after the cattle should have arrived, at least on the first market

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day after they did reach Covington; whilst Locknane insists he was not bound to sell on the first market day, but could await a reasonable time in the exercise of ordinary prudence.

It is very apparent from the evidence that the parties differed as to the Covington market, which doubtless, to a great extent, regulated the price in the surrounding country, as they had also differed as to the value of the cattle; when Grigsby thinking that Locknane's information, which he professed to have from Covington, was not reliable, proposed to take the choice fifteen of his herd at the rates the other seven would bring in the Covington market, they to be started the next day, which was accepted.

No discretion as to when they were to be sold was either asked or granted, but they were to be immediately started for market. This, together with the disagreement of the parties as to the then market price at Covington, leaves little room to doubt that both parties understood that the price should be governed by what the seven retained cattle would bring so soon as they could be gotten to Covington.

The market value on the first sale day, after reasonable time for Locknane to transport the seven cattle to Covington, is the proper criterion, at least as to the defendant, and certainly not more than the value on the first sale day after they actually arrived at Covington; and this, too, at cash rates and not when time is negotiated for. Whatever may have been ordinary prudence in Locknane as to the sale of his seven beef cattle at Covington, he could not increase Grigsby's responsibility for the fifteen by withdrawing the seven from market to await future and better price.

As the judgment is for dollars, which in this State can only be discharged in gold, the actual gold value of the currency should be ascertained and this amount adjudged, unless the parties should agree that currency shall discharge it.

As the instructions and judgment are adverse to these views, the judgment is reversed, with directions for a new trial and further proceedings consistent herewith.

Judge Robertson seeing no sufficient reason for changing the construction of the contract hitherto given by this court in affirming the judgment of the circuit court, does not concur with the majority in the construction indicated in this opinion.

Buckner, for appellant.

Huston, for appellee.

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JOHN ENGLEMAN v. E. D. BALL.

Principal and Surety—Indemnity—Attachment.

Under the statute, a surety may bring an original suit against his principal to compel him to discharge the debt or for indemnity, and auxilliary to this he may have an attachment, notwithstanding there is an action pending against him and his principal, seeking a common law judgment against them for the debt.

APPEAL FROM LINCOLN CIRCUIT COURT.

January 17, 1870.

RESPONSE TO PETITION FOR RE-HEARING BY JUDGE WILLIAMS:

Ball became Engleman's security in a note for \$2034.10 to Gentry who assigned it to McJames who brought suit on it in the Boyle Circuit Court against Ball and his principal.

Ball desiring to secure himself and having cause of attachment sued Engleman in equity in the Lincoln Circuit Court for indemnity and to compel him to discharge said debt and obtained an attachment.

The original process was executed on Engleman in Lincoln county and the attachment levied on property there.

Engleman demurred and answered controverting the causes of attachment and the justice of the demand, but did not deny that Ball was his security.

His demurrer is predicated upon the allegation in the petition that McJames had brought suit upon the note in Boyle county. This suit was simply for a recovery of a common law judgment on the note and brought in that county probably because Ball may have lived there or that he or the principal was caught there and actually served with process; but however this may be, McJames sought no auxilliary remedy by attachment, but the security for his own indemnity, as he may under the provisions of our statutes, brought an original suit in Lincoln to compel his principal to discharge said debt or indemnify him and as auxilliary to this original suit he sought and obtained an attachment. As Engleman was served with process in Lincoln county,

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that court had jurisdiction of both his person and property and properly held it responsible to the securities claim.

Bradleys, for appellant.

Durham, for appellee.

JOSEPH WARNER v. T. F. HAZELRIGG'S ADMR.

Appeal and Error—Final Orders—Exceptions to Commissioner's Report.

The overruling of exceptions to a commissioner's report, rejecting the claim of the litigant, is not a final order, from which an appeal will be allowed.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 12, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

The commissioner in his report in this case (it being a petition in equity for the settlement of the estate of Hazelrigg) reports adversely to the claim of the appellant Warner. Exceptions were filed by Warner to that part of the report excluding his claim and those exceptions were overruled. From the order overruling the exceptions, this appeal is prosecuted. An appeal cannot be prosecuted from a judgment or order that is not final and in the case of *Apperson v. Bondurant, & Metcalf*, page 30, this court decided that although a question of law and fact relating to final relief had been decided, still to make it complete the judgment must give the relief asked for. In the case, *supra*, the court adjudges that, "upon all the bills where Bondurant was an original party, whether as drawer or endorser, he must share equally the loss with Anderson and such is the judgment of the court upon the question involved." This court held that such a judgment was not final and dismissed the appeal in the case of *Philips v. Alcorn, & J. J. Marshall*, page

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38. Alcorn filed his bill in chancery to foreclose a mortgage and the court below adjudged that Philips should pay the money due Alcorn on or before the 1st day of the succeeding term of the court. Philips appealed to this court and his appeal was dismissed, the court deciding that it was within the power of the court below, at the succeeding term to set aside the interlocutory judgment and refuse to foreclose the mortgage, and therefore the judgment was not final. In the present case there has been no confirmation of the commissioner's report and if there had been, the circuit judge in making a final disposition of the case in the court below, upon becoming satisfied that the exceptions were improperly overruled would have the power to grant the relief, and allow the claim. It is the duty of the court below to reject all claims improperly allowed by the commissioner although there are no exceptions filed. and this court will reverse a cause where the commissioner has improperly allowed claims although exceptions were taken in the court below. The order in this case not being final, the appeal is dismissed.

Simpson, Brock, Turner & Cornelison, for appellant.

Hazelrigg, Apperson & Reid, for appellee.

W. A. WATHEN ET AL v. J. C. PHILIPS.**Costs, Against Defendant in Bill of Discovery.**

Where a petition, in which several defendants are joined, merely calls on one of them to assert his claim to the property, if any, even though no answer be made, costs cannot be adjudged against him.

Fraudulent Conveyance—Purchase of Property by Son for Use of Parent.

Property purchased by a son, for the use of his parent, cannot be subjected to the debts of the father.

APPEAL FROM MARION CIRCUIT COURT.

October 26, 1871.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

The appellee Philips had an execution issued upon a judgment in his favor against the appellant William A. Wathen for the sum of \$818, with its interest, and placed in the hands of the sheriff of Marion county, and by him returned "*no property found*" and thereupon the appellee filed this petition in equity seeking to subject to the payment of this debt, a house and lot in the town of Lebanon, at the time in the possession of Wathen, and alleged in the petition to belong to him. The petition states that the appellant W. A. Wathen, for the purpose of cheating and defrauding his creditors, had procured his stepson S. P. Marion, to borrow of Thomas Liles executor's a considerable sum of money for the benefit of him, Wathen, and for the purpose of buying this house and lot, and that although the deed was made to Marion, it was in fact the old man's property bought with his money, and that Marion held the title for him, until by some arrangement between them, Marion conveyed the property to Robert Wathen a son of William A. Wathen, C. P. Marion, Robert Wathen and Thomas Liles Admr., were all made defendants to the action and called upon to assert their claims upon the property, if any they have. Liles Admr. answers and says that the executors of Lisle have resigned and that he is the administrator with the will annexed of Thomas Lisle deceased, and as such, holds a note on Robert Wathen and C. B. Marion for \$2,954.88, that this note was originally executed to the executors and by them handed over to him as administrator *de bonis non*. C. P. Marion files his answer disclaiming any interest in the property, and alleging that the wife of Wm. A. Wathen is his mother, that her husband had become insolvent and in order to provide a home for his mother he in good faith, and not at the instance of his stepfather purchased the property; that the money borrowed by him of Lisle's executors was \$3000 for which he executed his note; that after he purchased the property he let Robert Wathen have it, upon his agreeing to pay off to Lisle's executors the amount of the note for the borrowed money; that Robert Wathen then executed his note for the money to Lisle's executors and he, Marion, became his surety thereon and the note is yet unpaid.

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Robert Wathen files his answer in which he claims to own the property, and makes the same statements in regard to it, and the manner of acquiring the title, as is set forth in the answer of his co-defendant, Marion. Upon the hearing of the case the chancellor subjected the property to the payment of the appellee's debt. The depositions taken in the case conduce strongly to show that in the years 1861 and 1862 about the time that Miller the partner of William Wathen left the State, and went South, that Wathen was left in the possession of considerable means both in money and property; that he shortly after made an assignment of his effects for the benefit of his creditors and that they realized a very inconsiderable sum out of the proceeds of the property assigned. What he did with the money, is involved in mystery, so far as this record shows. There is no proof that any portion of it was ever applied to the purchase of the property in controversy. The petition alleges that the money to pay for this property was borrowed of Lisle's executors. Both parties agree upon this fact. Lisle's administrator exhibits a note on Robert Wathen and Marion for near three thousand dollars. This note was handed him by Lisle's executors upon their resignation as such. There has been only about \$1200 paid on this note, and from the testimony in the case it was executed for the very money that purchased this property. The court erred in excluding the deposition of C. P. Marion in the case. He had no interest whatever in the controversy between these parties; no claim was asserted by him upon the house and lot, and no judgment is asked against him in the plaintiff's petition. If he had failed to answer the petition it would have been error to have made him liable for costs, as to claim was asserted against him, but on the contrary he was called on to set forth the claim he had upon the property, and he responded by saying that he had none. We perceive no reason for excluding his testimony. He swears that himself and James Wathen borrowed the money originally from Lisle's executors, that is, \$2500; that he himself borrowed upwards of \$3000; that one thousand dollars of the money he paid down and for the balance he executed his notes, and as they fell due they were paid by Robert Wathen out of the borrowed money from Lisle's executors, and that the note now held by Lisle's administrator against him and Robert Wathen is for the bor-

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rowed money, and in this he is corroborated by the note itself, in the hands of the administrator of Lisle. The only difficulty in the case is as to the payments on this note by Robert Wathen. The payment of \$954 was not made until some time in 1868, and the proof shows that Robert was an active business young man, engaged in trading and doubtless in the three years after his return from the army, had accumulated enough means to make this payment. The endeavor upon the part of the sons to secure a home for their parents ought not to be seized upon as evidence of fraud in the absence of any evidence connecting the old man with the purchase in any way. There is no proof that he ever paid one dollar for it, or that he procured the borrowing of the money as alleged in order to make the purchase, but on the contrary the greater part of the money borrowed by Marion and Robert Wathen with which to pay for this property is still due, and they individually owe for it. For the reasons herein indicated the judgment of the court below is reversed so far as it subjects the house and lot to the payment of appellee's debt and the court directed to dismiss the petition so far as it seeks to make the same liable therefor. The judgment against Marion for costs is also erroneous and is reversed with directions to dismiss the petition as to him. We perceive no error in the court striking from the record the amended petition filed in vacation. The amendment was filed after the pleadings were all made up, and could not have been filed without leave of the court. The case is affirmed on the cross appeal.

W. J. Lisle, for appellant.

Russell & Avritt, for appellee.

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R. H. WILSON v. GEORGE V. MORRIS.

Bankruptcy—Discharge Relieves Debts.

A discharge in bankruptcy releases the debtor from legal liability upon all of his previous debts.

Same—Account—Subsequent Promise to Pay.

An action on a debt due by one discharged in bankruptcy upon an alleged promise to pay, after the discharge, can be maintained alone upon such promise to pay.

Accounts—What Constitutes New Promise to Pay—Discharge in Bankruptcy.

An expression by a debtor, after his discharge in bankruptcy, of his intention to pay certain old debts, does not amount to a promise to pay, unless made to the original creditor, or to some one therefor, or on presentation of the accounts to him for payment.

APPEAL FROM FLEMING CIRCUIT COURT.

October 20, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

The appellee George V. Morris on the 9th of April, 1870, instituted an action by ordinary petition against the appellant Wilson and his wife, upon an account for merchandise, alleged to have been sold and delivered to the wife by the appellee, amounting to \$172.79. The petition alleges that the articles were necessities for the family, and such, as made the wife's estate liable for the debt. The wife answered denying any liability upon her part for its payment, and the husband by his answer, relied upon his discharge in bankruptcy as a bar to appellee's recovery, etc.

The appellee then filed an amended petition, in which he alleges that the appellant after he had obtained his discharge in bankruptcy "*faithfully and expressly promised*" the appellee to pay him the account set forth in the original petition. The appellant Wilson in his answer controverted all the allegations of the amended petition in reference to the alleged promise to pay. The only question presented is as to the sufficiency of the

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evidence to maintain the cause of an action presented by this amended pleading. The appellee proved by one witness that appellant stated to him "*that his object in taking the bankrupt law, was to avoid paying security debts, and that he intended to pay the witness what he owed him, and that he intended to pay the appellee George V. Morris, and that he would pay all he owed as soon as he could.*" Another witness, the clerk of appellee heard appellant say "*that his object was to avoid paying security debts, and that he intended to pay Dr. Lightfoot, George V. Morris, the appellee and some others whose names he does not recollect.*" A discharge in bankruptcy releases the debtor from legal liability upon all of his previous debts, but as has been often decided, the moral obligation to pay these debts, is a sufficient consideration to make the debtor legally responsible upon a promise to pay the original debt. The promise however when made does not revive the original debt and the action can be maintained *alone upon the promise to pay, Graham v. Hunt, B. Monroe, 7.* The amended petition alleges an express, unconditional promise to appellee by the appellant to pay this debt. The burden of proof was upon the appellee to show that this promise had been made. The testimony offered on this point is the substance of casual conversations held by the appellant with third persons shortly after his discharge in bankruptcy, and were evidently had with a view of excusing himself for the step he had taken in order to relieve himself of his indebtedness, and not for the purpose of assuming by these statements any legal liability. He never held any conversation with the appellee on the subject. No claim or debt had been presented to him by the witness who detailed these conversations for payment, or by any one else, and certainly no promise was made by appellant to them or either of them to pay this particular debt. His expression of an intention to pay in connection with the conversations proven do not amount to a promise to pay. An inference might be drawn from the conversations held with the witness that the appellant designed paying all of his individual liabilities, but whatever his intentions might have been, on the nature of the moral obligation upon him to pay, he evidently did not intend by these conversations to change this moral obligation into a legal liability. No such promise is proven as alleged either to the appellee himself or to any one else for

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him. The judgment of the court below is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Rodman, Cox, for appellant.

Cord, for appellee.

GEORGE W. WHITE ET AL v. D. H. HICKEY ET AL.

Judicial Sales—Right to Partite Lands After Sale and Before Confirmation.

A sale, ordered at the instance of the litigants upon an agreed judgment, may be set aside at their request, and the lands partited, according to their agreement.

Same.

Where before a sale by a commissioner is confirmed, the litigants, for whose benefit the sale was made, notify the commissioner they did not want the judgment executed, a subsequent confirmation of the sale by the court, will be dismissed.

APPEAL FROM SCOTT CIRCUIT COURT.

October 2, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

This court can perceive no good and valid reason for enforcing the sales made by the master commissioner in opposition to the wishes of the appellants. Although the judgment under which said sales were made, was entered at their instance it was for their sole benefit, and could only be enforced by their consent. They had the legal right to make partition of the property after the judgment, and their deeds vested each grantee with a perfect title to the estate conveyed.

Before the sale by the commissioner was completed by the execution of bonds by the purchasers he was notified that the partition had been made, and that the parties did not wish the

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judgment executed. This information he doubtless imparted to said purchasers, but whether he did or not they were nothing more than preferred bidders. It was still within the power of the chancellor to reject their bids. The appellants were somewhat derelict in not preventing the sales, but as neither of them were present when the sales were made either in person or by attorney they are not directly responsible for the action of the purchasers. The confirmation of the sales under the circumstances will work a great hardship upon appellants, a hardship they ought not to suffer, when it can be averted without divesting appellees of any vested rights or even of depriving them of speculations to be made upon the property bid for. They claim and the proof offered by them conduces to show that they bid not only the fair value for the property but even more than this. If such be the case they will lose nothing by having their bids rejected.

The judgment of the court confirming the commissioner's report is reversed, and the cause remanded with instructions to sustain the exceptions to such report, and cancel the purchase bonds. A reasonable allowance should be made to the master for making the sale.

Stevenson, for appellant.

Robinson, for appellee.

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A. WILE ET UX v. SWEENEY ET AL.

Judicial Sales—By Sheriff.

A sale by the sheriff, of land, on any day than the first day of a circuit or county court, is without authority and void.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 21, 1871.

RESPONSE BY THE COURT TO PETITION FOR RE-HEARING, BY
JUDGE PRYOR.

(See 2 Duvall, 161.)

The attention of counsel for the appellees is called to the first opinion rendered in this case and reported in *2nd Duvall*, page 161. This court in that opinion say "that a sale by the sheriff of land on any other day than the first day of a circuit or county court is without authority and consequently void." And in this same case the following language is used: "As the sale of land in controversy was not made by the sheriff on the day fixed by law, it was a nullity, and his subsequent deed, based on such void sale passed no title to the appellees." This sounds very much like this sale had been declared void. Reference is also made to sec. 2, article 13, chapter 36 of the *Revised Statutes*. In the second opinion delivered in this case, this court uses this language: "The plaintiffs showed a defective execution of the suit and an informal and illegal sale," and in the opinion delivered at the present term the sale based upon the former opinions of this court was regarded as void and as passing no title whatever to the purchaser. The court below may have decided that the sale passed but an equity, but this court in pronouncing upon that judgment adjudged that the sale was void. Counsel wish to know if the sale was void, how the purchaser Wier obtained an equity, and how he passed that equity to Sweeney and Taylor to whom he sold his bid. The question is easily answered. The execution had been levied on this land, and although the sale was void and passed no title, legal or

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equitable, the lien created by the levy still existed and in this way originated the equity on the part of the appellees. In the commissioner's report made in the case when the last judgment was rendered in the court below, the appellees were allowed large sums for insurance when there was no proof that Wile ever authorized the expenditure. This court in the second opinion delivered in this case, makes no reference to the items for insurance but attempts to lay down the basis by which the accounts between the parties were to be settled. The whole case went back under the order of reference to the commissioner and this court has never passed upon any of the items contained in the accounts between the parties. Counsel wish also to know if any of the bid at the sale is to be allowed; how does the court cut out so much as was the costs of the sale, etc. Not one cent of the bid has been allowed; the amount of the execution and costs up to the time of the levy and including the levy has been allowed for the reason that the levy created a lien on the land not because of this void sale. No interest should be allowed for the repairs and improvements, for the reason that the appellees were in possession deriving the benefit from these improvements and the appellant is only entitled to the rents of the property in its condition before the improvements were made, but if the appellees have received more than a fair rental value, that is, rented it for a price exceeding the usual price of renting, looking alone to its condition at the time they took possession and not its enhanced rental value by reason of the improvement they entered account for the rent they have thus received. How much would the property have rented for in its condition when appellees received it if without the improvements, they rented it for more than a fair rental value they should account for it. The increased rental value of the property by reason of the improvements, appellees are not liable for. This court as has been frequently decided will reverse a case for error appearing upon a commissioner's report in the settlement of accounts between parties, although no exception was made to the report in the court below. There has been no final adjudication of the matters of account between these parties. The petition for a rehearing is overruled.

Bush, for appellant.

Sweeney & Stuart, for appellee.

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F. M. WILLIAMS v. WILLIAM L. LOMNER.

Covenant—Implied Warranty—Bond for Title.

There is no implied warranty by the assignor of a bond for the conveyance of land.

Same—Specific Performance.

A holder of a bond for title, must first seek by legal process, a conveyance from the vendor, and if defeated, can have recourse on the assignor of the bond, but not on implied warranty of title.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

October 10, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The answer of the appellant presents no valid defense. If it be true that he held the bond of Newman for a conveyance of the Illinois land in trust for Ramsey and Morris, and that the note was given in consideration of their surrender to him of their claim to said bond, he at best took it as their assignee.

There is no implied warranty by the assignor of a bond for the conveyance of land. *Moredock v. Rawlings*, 3d Monroe 75. It was the duty of the appellant to take the necessary legal steps to compel Newman to convey the land in compliance with his bond. And if after the use of due diligence, he was defeated in this attempt he would have recourse on Ramsey and Morris on their contract of assignment, but not on an implied warranty of title. His answer discloses the fact that no suit has as yet been brought by him against Newman. No allegation of insolvency is made against his assignors, and no reason is assigned why he has not attempted to compel Newman to convey.

In addition to this fact he fails upon the trial to prove that Newman has refused to convey.

The judgment appealed from must be *affirmed*.

Winn & Summers, Apperson, for appellant.

R. Reid, for appellee.

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W. C. WILHOIT v. JOHN B. HANCOCK ET AL.

Frauds, Statute of—Written Agreement to Arbitrate Parol Sale of Land.

A written agreement to arbitrate a parol sale of land, is sufficient to take it out of the Statute of Frauds. It is not material whether the finding of the arbitrators was enforceable or not.

Contract for Sale of Land—Vendor and Purchaser.

Where a contract in parol is made for the sale of land, by the vendee, redeeming two tracts, if one of them be subsequently redeemed by an agent of the vendor at his instance, this will not void the redemption of the other by the original vendee nor affect his contract of purchase.

APPEAL FROM OWEN CIRCUIT COURT.

October 23, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The evidence leaves no doubt but that the appellant with his own means paid to J. H. Wilhoit the vendee of Lee (\$1220) twelve hundred and twenty dollars, the amount required to redeem the two hundred acre tract of land in controversy.

It is also very clear that this payment was made by appellant in pursuance to a contract between him and his father that he should have said land in case he would raise the money and redeem it. The father placed appellant in possession of the land and never did disturb or by any legal proceeding attempt to disturb his possession.

This contract was originally in parol, but when the matters in dispute between appellant and his father were on the 8th of September, 1861, submitted to arbitrators for adjustment, the difference between the parties with relation to the sale and purchase of the land, then occupied by them (and which the proof shows was the land redeemed by appellant) was one of the questions to be settled. This written agreement of submission is a sufficient memorial of the sale of the land to take it out of the statute of frauds.

We do not deem it material whether the finding of the arbi-

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trators was enforceable or not, and we will not enquire into that question.

The written agreement of submission took the sale out of the statute of frauds, and at the time of the trial of the cause, appellant had possession of the land and held by assignment the title bond of Lee who was at the time of his death the holder of the legal title to the land.

The evidence conflicts to some extent as to the exact nature of the agreement between appellant and his father with reference to the redemption of the land from J. H. Wilhoit. It seems that it was originally contemplated that two tracts should be redeemed, and it is insisted that because this contract was not literally executed, appellants claim to the tract redeemed, cannot be specifically enforced. Whatever the agreement may originally have been, it was modified before appellant paid his money to J. H. Wilhoit. This fact is proved by two witnesses, who seem to have known all about the transaction and one of whom testified against his own interest. Besides this, the father, put it out of appellant's power to redeem one piece of the land by permitting one of his sons-in-law to redeem it, and afterwards permitted appellant to redeem the tract in controversy, put him in possession of it, and repeatedly stated in conversations that appellant took and held the same as a purchaser.

Considering all the facts of the case we are of opinion that Lee's heirs should have been adjudged to convey to appellant, and that his title should be perfected.

Wherefore the judgment is reversed and the cause remanded with instructions to render a judgment conforming to this opinion. On the cross appeal judgment affirmed. Chief Justice Pryor did not sit in this case.

Drane, for appellant.

Grover & Scott, for appellee.

Opinion of the Court.

WILLIAM WILSON *v.* H. B. HELM ET AL.**Taxation—Municipal Corporation, Extending Corporate Limits.**

Wilson's land was separated from the built-up portion of a town by a creek, over which no crossing was erected, and during several months of the year, could not be crossed on foot. Only three families lived on this side of the creek, and no improvements or streets were constructed. Held, not to be liable for city taxation under an act taxing farm lands in the corporate limits.

Same—Municipal Corporation—Ordinance.

The ordinance providing for taxing farm lands within the corporate limits of a town extending for a long distance beyond the resident section, is held in violation of the spirit of the constitution, and void.

Same—Tort—Liability of Trustees.

The seizure and sale of the property under such an ordinance, would not be malicious, and the owner could not recover more than its actual value, and the trustees of the town would not be liable personally.

APPEAL FROM HARDIN CIRCUIT COURT.

May 9, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

Prior to 1867, the town of Elizabethtown embraced within its corporate limits about two hundred acres of land. By acts of the legislature passed in that year, together with another act approved February 26th, 1868, the territorial limits of the town were so extended as to form a square one and one-half miles in length on either side, and embracing 1,440 acres of land. At that time the population could not have exceeded fifteen hundred persons, and a very large portion of the area inclosed in this extension consisted of farming and horticultural lands, and much of it of land wholly unimproved. By the 19th section of this last act all lands within the corporation used for agricultural and horticultural purposes were exempted from municipal taxation. The appellant, Wilson, who lived on a farm adjoining the old town, violently opposed this extension, and very shortly thereafter became engaged in litigation with the town, because of the fact

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of his opposition to the collection of the municipal taxes assessed against his property. It seems that some time in the latter part of the year 1867, he sold his farm, and shortly thereafter purchased $34\frac{3}{4}$ acres of unimproved land located within the town boundary, but exempt from taxation by the act of February 26th, 1868. He proceeded at once to clear and enclose a portion of the same, and to devote it to both agricultural and horticultural purposes. He also erected upon the tract a handsome and commodious residence. After this, in 1869, this last act, without Wilson's consent, was so amended as to repeal the 19th section and to authorize the taxation of lands used for horticultural and agricultural purposes. The taxes assessed against Wilson's land under the act as amended he refused to pay, and the marshal having levied upon and sold some of his personal property in satisfaction of the same, he brought an action against the marshal and board of trustees to recover the value of said property, claiming that the town charter as amended so far as it authorized his land to be taxed for municipal purposes is in violation of the State Constitution, and therefore void.

This court many years since laid down the doctrine that where vacant land or improved farms occupied by the owners and their families for agricultural purposes and not required either for sheds or houses or other purposes of a town are brought within its taxing power by an act extending its limits, that it is in effect taking the money of the proprietors for the use of the town without just compensation to them (*Cheary v. Hooser*, 9th B. Monroe, 346). And that where the owners of such lands have made no town upon them and desire none, and where there is no legitimate necessity justifying the extension of the boundary so as to include the same, and where the obvious effect is to subject them to taxation for the exclusive benefit of the town, that it constitutes a clear case of taking private property for public use in the form of taxation without making compensation therefor (*City of Covington v. Southgate*, 15th B. Monroe, 498). In every subsequent decision this doctrine has been recognized and approved. From the record before us it seems that Wilson's land is separated from the built-up portion of the town by a creek over which the corporate authorities have erected no crossing, and which, during several months of each year can be crossed by footmen with great difficulty if at all. That there are but three families living within the town

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limits east of said creek, Wilson and two negroes; that there is no improved street constructed or in process of construction from Wilson's premises to the business portion of the town; that there are no lots, streets nor alleys on the same side of the creek with him, and none needed in view of the sparsity of the population; that the nearest street lamp to appellant is 650 yards in a direct line, and much farther by any practicable route; that the court house is more than 1,000 yards distant; that the church at which his family worships is much farther than the court house, and that his nearest neighbor is over 200 yards from him. He receives no protection from the police, and, indeed, it seems the municipal officers visit the extensive tract of country lying east of the creek only for the purpose of enforcing the collection of the taxes assessed against the appellant. We are unable to perceive in what manner he is benefited in the slightest degree by reason of his lands being embraced within the boundaries of the town. It is true the value of his land is enhanced by its proximity to a growing town, but so is that of every one else situate in the same vicinity. This is not the character of the compensation for private property taken for public use contemplated by the Constitution. The party whose property is taken should receive some of the advantages resulting from the municipal government. Some portion of the money he is compelled to pay in the way of taxation should be so expended as to benefit him in some degree either directly or incidentally. Tested by these principles we are of the opinion that the act under which the taxes against appellant were assessed, is in conflict with the spirit of the Constitution and therefore void.

We do not, however, agree that the seizure and sale of his property was malicious, nor that he should recover more than its actual value, nor that the board of trustees are personally liable to him for any amount. These conclusions render it unnecessary to discuss the remaining questions involved in this appeal.

We are of opinion that the circuit court erred in dismissing the appellant's petition as to the Marshall Warren, and to that extent the judgment is reversed, and the cause remanded with instructions to render judgment in Wilson's favor against Warren for the damages sustained by him as fixed by the verdict of the jury.

W. Wilson, for appellant.

Wintersmith, for appellee.

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M. F. WINTERSMITH ET AL *v.* ALBERT GOODIN ET AL.**Creditors Suit—Fraudulent Conveyance in Contemplation of Insolvency.**

In a suit to set aside a conveyance made by an insolvent, a creditor, who, from the nature of the conveyance, assisted in protecting himself and several other preferred creditors, by accepting the property and paying off the claims, merely substitutes himself to the rights of such creditors to the extent of his payments, with no right of priority over others in the subsequent distribution of assets.

Equity—Right of Co-Owner to Improvements—Substitution of Creditors.

Equity will give a co-owner a right in a partition proceeding, to the exclusive use of valuable and lasting improvements made thereon, and the creditors of such owner would be subrogated thereto.

Same.

This could not be defeated because the co-owner had used the whole interest, without payment of a rental. The other owners could only prove their claims in the proceeding, like other creditors.

Dower and Curtsey—Sale Before Allotment.

Before assignment of a widow's dower she has such an interest in her deceased husband's estate which is the subject of bargain and sale, like any other inchoate interest in realty.

Same—Husband and Wife.

The wife can pass such an interest by deed, and her creditors can have the dower allotted and subject same to their claims.

APPEAL FROM LABUE CIRCUIT COURT.

May 15, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The pretended sale of the personal property by Elizabeth and James Farleigh to Williams was properly located as a nullity by the court below. It was an evident attempt upon the part of all concerned to invest the title to said property in Williams to enable him to hold for the benefit of his pretended vendors. It could not be regarded as a sale made for the purpose of preferring one creditor to the exclusion of others, but was rather an attempt to prevent the property from being subjected to the payment of

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the claim of *any real creditor*, and it therefore did not come within the provisions of the act of 1856.

It is, however, clear from the record, that the sale of the farm to Goodin so far as Mrs. Farleigh and James were concerned was a sale made in contemplation of insolvency and for the purpose of preferring certain favored creditors. They were hopelessly insolvent at the time, and they both must necessarily have been aware of the existence of that fact. That they intended with the proceeds arising from the sale of their interests in said farm to pay in full the claims of a portion of their creditors to the total exclusion of the appellants, does not in our opinion admit of a doubt. Their vendee Goodin was permitted to retain out of the purchase price the full amount of his claim, and also so much as was necessary to indemnify him on account of his suretyship to Johnson, and he was also directed to pay off several other creditors in full, and no provision whatever was made for the payment of any portion of the debts due to the appellants, all of which are admitted to be just. It is claimed by the appellee Goodin that notwithstanding this may be true, still he is entitled to be protected in his purchase at least to the extent of the payments made by him on the land, and that in any event he should be that far regarded as a preferred creditor. The case of *Whittaker v. Garnett, &c.*, 3 Bush, 402, is relied upon as sustaining this position. But there is a material difference between the attitude occupied by Whittaker and that of Goodin. The mortgage executed by Dean to Whittaker was in part to secure the repayment of money actually loaned at the time to enable him to continue in business, and whilst it appears that at the time of the execution of the mortgage Whittaker was apprised of Dean's financial difficulties, it does not appear that he knew that he contemplated insolvency, but we may assume that upon the contrary he was led to believe that with the money advanced by him upon the mortgage Dean would be able to meet his pressing liabilities and probably to extricate himself from his financial embarrassments. This assumption is strengthened by the fact that Dean was left in possession of all the mortgaged property, and continued in business until his creditors attacked the mortgage as fraudulent. With Goodin the case is entirely different; the sale to him divested his vendors of the control and possession of their entire estate, and deprived them of the ability to continue in business. The payments to the pre-

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ferred creditors which were partly made through him, exhausted more than one-half of the entire purchase price of the farm, and the co-tenants of Mrs. Elizabeth Farleigh and James, were entitled to receive more than two-thirds of the cash payment. They were thus left with but about two thousand dollars in available assets, with which to meet an indebtedness of not less than ten thousand. We feel satisfied from the record that Goodin knew the sale was made by Elizabeth and James Farleigh in contemplation of insolvency and to prefer creditors, and that he was fully aware that in case it was upheld by the courts, it would put it out of the power of the deferred creditors to realize anything whatever upon their claims. Such being the case he does not occupy the favorable position of a bona fide creditor free from all knowledge of, or participation in the act of bankruptcy committed by his vendors, but rather of a creditor seeking not only to secure himself, but to assist the failing debtors in their attempt to evade the legal effect of the statute of 1856, and to make an inhibited distinction between other creditors whose claims were equally meritorious. In his attempt to give this assistance he has merely succeeded in substituting himself to the rights of those creditors whose claims he has paid, and of making himself the creditor of the bankrupts to the extent of his payments to them for their interests in the farm, with no right of priority over the appellants or any other creditor, in the distribution of their assets. With the conclusions of the circuit court upon this branch of the case we fully concur.

It seems that the court in its directions to the commisisoner appointed to allot to Goodin the four interests in one-half of the land which he takes under the conveyance from the four children who are not responsible for any part of the indebtedness of their mother and brother James, prescribes that in making such division they shall take into consideration quantity and quality. The effect of this is to make said four children equal participants in the valuable improvements shown to have been put upon the land by Mrs. Farleigh as we hold with her own individual means. In this we think the court erred.

Mrs. Farleigh being the owner in fee of an undivided one-half of the entire tract, had the right to enter upon and for her own benefit make valuable and lasting improvements thereon, and in a partition she should be entitled to have said improvements allotted to her without charge, and so likewise are her creditors. This

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equitable rule is not to be defeated, because of the fact she has used and occupied the interests of her co-tenants without the payment of rent. She was not then trustee nor guardian, and if she owes them anything on that account, they can prove their claims in this proceeding like other creditors. We are also of opinion that the court erred in adjudging that Mrs. Farleigh's right to have dower allotted her in the one-half of the tract owned by her deceased husband did not pass to her creditors under her conveyance to Goodin.

It is true that until the widow's dower has been assigned, she has no such estate in the lands of her former husband as can be taken and sold under execution, but even before assignment she possesses a claim which is the subject of bargain and sale, like any other inchoate interest in realty. This right passed by said conveyance, and her creditors can have her dower allotted and then subject that estate to the payment of their claims. We perceive no error in the judgment as to the claim in favor of Thomas, nor in any other respect except in so far as we have indicated in this opinion, but to that extent the judgment is reversed, and the cause remanded for further proceedings consistent herewith. Upon the cross appeal the judgment is affirmed.

Brown & Murray, Wintersmith, for appellant.

Johnson, Howell, for appellee.

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ELIZABETHTOWN & PADUCAH R. CO. v. CONRAD KURTZ ET AL.

Eminent Domain—Compensation to Owner.

Just compensation to the owner for taking his property for public use without his consent, means the actual value thereof in money, without any deduction for estimated profit, or the advantages accruing to the owner for the public use.

Same—Set-off.

Speculative advantages or disadvantages, independent of the intrinsic value of the property from the improvements, are a matter of set-off against each other, and do not affect the dry claim for the intrinsic value of the property taken.

Same—Just Compensation.

As the owner of the land has the right to demand pay for that taken, notwithstanding that the use to which it may be put, may greatly enhance the value of the remaining land, he cannot be allowed to avail himself of this enhancement to increase the value of that for which the public is required to pay.

Railroads—Damages for Taking Property for Right of Way—Rule.

In an eminent domain proceeding for damages for taking property by a railroad company, no fact which does not certainly and absolutely have the effect of causing an immediate and definite depreciation of value shall be taken into consideration.

Set-off and Counter-claim—Provisions in Charter of Railroad Company, For.

Damages occasioned, danger of fire, injuring of stock, inconvenience of hauling across the track, and discomfort by passing trains, are consequential, and are off-set by the provisions in the charter of a railroad company, providing, "advantages to such residue of property to be derived from the building and operating of said road by, through or near such residue."

APPEAL FROM HARDIN CIRCUIT COURT.

October 24, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

This appeal is prosecuted from a judgment of the Hardin circuit court fixing the compensation to which appellees are entitled for the right of way granted through their lands to the Elizabethtown & Paducah Railroad Company.

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We are of opinion that the appeal was properly prosecuted to this court. The provisions of the 38th section of the amended charter of said railroad company construed in connection with the 15th section of the Civil Code of Practice are conclusive upon this question.

By the judgment complained of appellees were allowed for four and three-quarter acres of land shown by the evidence not to exceed in intrinsic value thirty dollars per acre, the sum of \$712.50, and also the further sum of \$200 for additional fencing rendered necessary by the appropriation of such land. The 13th section of appellant's original charter empowers the railroad company to acquire the right of way by the condemnation of lands lying upon the line of its railway, and necessary for its construction and successful operation, in all cases in which it cannot agree with the owners of such land, and provides, that the jury (for whom the amended charter substitutes commissioners) "in estimating the damages shall find for the owner or owners the actual value of the land or other thing proposed to be taken, but in estimating damages resulting incidentally to the other land or property of such owners, shall offset the advantages to such residue to be derived from the building and operating of said road by, through or near such residence.

This is perhaps as broad and comprehensive a delegation of such authority as it is within the power of the legislative department of the State government to make. As has been repeatedly held by this court no citizen can be compelled to give his property to the public, and if it be taken for the public use, the citizen has the right to demand the full value of the thing taken, notwithstanding the fact that he may with others be incidentally benefited by its appropriation. *Sutton Heirs v. City of Louisville*, 5th Dana, 26; *Rice, &c., v. D. S. & T. R. Railroad Co.*, 7th Dana, 81; *Jacob v. City of Louisville*, 9th Dana, 114. Mr. Sedgewick accepts as correct the doctrine of Chancellor Kent "that a just compensation to the owner for taking his property for public use without his consent, means the actual value of the property in money, without any deduction for estimated profit, or advantages accruing to the owner for the public use of his property. Speculative advantages or disadvantages, independent of the intrinsic value of the property from the improvements are a matter of set-off against each other, and do not affect the dry claim for the intrinsic value of the

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property taken." *Sedgewick on Damages*, 566; *Kent's Com.*, Vol. 2, page 339. .

In the application of this doctrine, this court has held (and we think correctly) that the intrinsic value of the land taken, is to be ascertained by determining what it is worth to the person from whom it is taken, all the surrounding circumstances being considered. "Just compensation means something more than the market value of the land appropriated, considered as a separate tract. The real question is what would be its value to the owner, situated as it is, if he did not own it, but owned the adjacent lands on both sides of it. *Hen. & Nash. R. Co. v. Dickerson*, 17th B. Monroe, 178. In determining this question it should be borne in mind that as the owner, has the right to demand pay for the land taken, notwithstanding the fact that the use to which it is to be put, may greatly enhance the value of his remaining land, that he cannot be allowed to avail himself of this enhancement to increase the value of that for which the public is required to pay.

It seems to this court that the simplest, and perhaps the most certain rule, by which to ascertain the actual value to the owner of the land taken, is to ascertain first, what would be the actual cash value of his entire tract of land, not including the enhancement brought about by the contemplated public improvement, then (still excluding this enhancement), what would be its value after the appropriation of that portion sought to be condemned. The difference between the value of the whole tract before and after the appropriation of that portion taken by the public, must of necessity be equal to the value of that appropriated to the person from whom it is taken. What particular circumstances, or inconveniences growing out of the separation of the original tract into two or more parcels, should be considered by courts or juries, in adjusting the difference in the value before and after such separation, cannot from the very nature of the case be indicated or defined.

The peculiar facts and surroundings of each particular case, must of necessity exercise a controlling influence in the settlement of the questions therein involved. There is no rule, however, which should prevail in all cases, no fact which does not certainly and absolutely have the effect of causing an immediate and definable depreciation of value, should be taken into consideration.

Inconveniences and disadvantages not growing out of the

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appropriation of the land, but out of the construction and use of the improvements such as additional fencing rendered necessary, *L. & N. R. Co. v. Glazebrook, 1st Bush, 325*. Danger of fires, or of injuring stock, the inconvenience of hauling across the railroad or other public work, and the discomfort and danger occasioned by passing trains, &c., may be said to follow the construction of the improvement and the use to which it is being put, and not the mere appropriation of the land. Damages thereby occasioned are consequential against which the appellants charter authorizes the advantages to the land not taken to be set off.

The principles herein declared differ essentially from those by which the judge of the county court was governed in making up his judgment, and as their observance will lead to conclusions different from those reached by him, and materially reduce the amounts adjudged to appellees, his said judgment must be reversed.

The cause is remanded for further proceedings not inconsistent with this opinion.

Bigger & Moss, Pindell, for appellant.

Wilson, Brown & Murray, for appellee.

CHARLES OELKER v. C. & J. VAN GUNDY ET AL.**Vendor and Purchaser—Parties to Action Involving Unlitigated Lands.**

Where, in a suit for specific performance and an election by a defendant to pay protanto and accept such title as his vendor had, before final judgment is rendered, all interested parties should be brought before the court, and be made to disclose their interests.

APPEAL FROM CAMPBELL CIRCUIT COURT.

June 13. 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

Christopher Van Gundy, claiming to own a tract of about 93 acres of land which had descended from Christian Van Gundy,

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deceased, to his ten children (said Christopher and others), undertook to sell and convey it, on the 7th of July, 1868, to the appellant, Charles Oelker, for \$4,000, for an unpaid balance of which the appellant executed his two notes, one for \$1,625 payable so soon as Van Gundy should have the title to the land "perfected and completed," and the other note for \$1,000 payable one year after that event; and as security for the payment of these notes, Oelker made a mortgage of the land to Van Gundy.

C. Van Gundy assigned the notes and mortgage to Jacob Van Gundy, and they, uniting as plaintiffs, brought this suit for a foreclosure of the mortgage as to the debt of \$1,625, alleging a compliance with the stipulation to perfect and complete the title.

Oelker defended the action suggesting several defects in the title; and the plaintiffs having exhibited such title as they had, obtained a rule on the defendant to elect either to retain and pay *pro tanto* for the title which was vested in him, or to take a rescission of the contract, and he having elected the first alternative, and the court being of opinion that said C. Van Gundy was at the time of the contract vested with the title to seven undivided tenths of the land which passed by his deed to the defendant, but that his title was imperfect and incomplete as to the residue one-tenth of which, formerly the share of Jacob Van Gundy, being claimed by Damnard as purchaser at a decretal sale, and another tenth part having descended to the heirs of Mrs. Weaver, and another having been incorrectly conveyed by Phister and wife, it was finally adjudged, without further action to complete the title, in substance, that the defendant have an abatement of \$800 for the two-tenths of the land running subject to the claim of Damnard and Mrs. Weaver's heirs and that one-fifth part of the land, for those two shares, be laid off and restored to Van Gundy; and as to \$400 more of the unpaid price of the land, as for the tenth part incorrectly conveyed by Phister and wife the action be dismissed without prejudice.

Oelker has appealed from the judgment, and the Van Gundys have prosecuted a cross appeal.

As we construe the contract and election of the appellant, it was the duty of the plaintiffs to take such action as to settle and determine the right of Oelker to the seven-tenths of the land to be retained by him, excluding alike therefrom the interests of the plaintiffs, and Damnard, Weaver's heirs, and Phister and wife,

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whose claims should by the judgment, have been restricted to the three-tenths, not paid for nor retained by Oelker, and for that purpose we think it devolved on the plaintiffs to bring the parties before the court, in order that the defendant might under his election, have a perfect and complete title to so much of the land as he retained, and the court erred in adjudging the payment of the balance of the price of seven-tenths of the land without causing this to be done. But if it had been done, it would have been proper not only to have caused a restoration to Van Gundy of the two-tenths affected by the claims of Damnard and Weaver's heirs, but also the other tenth part as to the price of which the action was dismissed.

It results, therefore, that the judgment is deemed erroneous to the prejudice of both parties. Wherefore, the judgment is reversed on both the appeal and cross appeal and the cause remanded for further proceedings not inconsistent with this opinion.

Hallam, for appellant.

Fearens & Hawkins, for appellees.

CITY OF CYNTHIANA v. HENRY E. SHAWHAN.

Pleading—Demurrer to Petition of City for Improvements.

A petition, fully setting out the ownership of property by a defendant, and sufficient notice to him to improve same under an ordinance, and failure, is good on demurrer.

Same.

This presumtively being the exercise of legitimate power, if otherwise, must be shown by the answer of the defendant setting out the facts of legislative spoliation.

APPEAL FROM HARRISON CIRCUIT COURT.

March 9, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The second and fifth sections of the charter of Cynthiana desig-

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nate the number of councilmen to be elected and provides that five councilmen and the mayor shall constitute a quorum to do business, and that the affirmative vote of the five councilmen, or four, with the mayor shall be sufficient to adopt a measure, except, five councilmen shall concur in levying taxes, in the election of any officer of the city government, or the passing by-laws or ordinances. The ordinance in this case had the requisite sanction of five councilmen, and was therefore obligatory.

The original and amended petitions sufficiently aver that the defendant had property on the named streets within the city and that the city council had notified him to have it improved and that on his failure they had it done at his expense, setting out the same, and for which they asked judgment. Presumptively this was the exercise of legitimate power, but if otherwise it must be shown by defense setting out the facts showing it to be a legislative spoliation and not legitimate taxation for improvement purposes.

The demurrer was improperly sustained as to the first amended petition, wherefore, the judgment is reversed for further proceedings consistent herewith.

Cleary & West, for appellant.

J. Ward, A. H. Ward, for appellee.

SUSAN VICK v. JOHN F. BARCLAY.**Descent and Distribution—Devise in Fee Simple.**

A devise in real and personal estate to children in fee, is not made defeasible by the declaration "should either of my children die without children, the surviving children to inherit." It is not a limitation of the title or a restraint on the *jus disperendi*.

APPEAL FROM LOGAN CIRCUIT COURT.

March 5, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The devise to the testator's children of real and *personal* estate

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in fee is not made defeasible by the declaration "should either of my children die without children, the surviving children to inherit," but that super-addition would be most consistently interpreted as a mere testamentary recognition of the law of descent and distribution, and not as a limitation of the title or a restraint on the *jus disperendi*.

Wherefore, the judgment of the circuit court limiting the estate to a defeasible fee is reversed, and the cause remanded.

Rhea, for appellant.

J. M. TAYLOR, TRUSTEE, v. W. G. TAYLOR.

Judgment by Default—Defendant's Negligence.

A plea that a defendant, who had not employed an attorney, was present at a term of court and learned that all ordinary cases would go over, and had a good defense, is insufficient to set aside a default judgment.

APPEAL FROM HENDERSON CIRCUIT COURT.

March 2, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellant recovered a judgment by default against appellee on a note, December 27; on the 30th the defendant filed his affidavit showing he was in attendance on the court on the 24th when the jury was adjourned over until January 1, and learned that no business would be done on the ordinary but would be on the equity docket; that he had not then employed an attorney, but did so since, and had a good defense to the entire action and presented his answer also.

As by the recognized rule both the days of judgment and motion must be counted, the motion was too late unless prevented, unavoidably, as provided in section 371, Civil Code. It was the parties' own negligence and not unavoidable casualty, for there is no pretense that the court had misled him, nor does he disclose

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how he got his information; had he appealed to the proper source he would doubtless have been properly informed. But the judgment on the merits is equally erroneous.

The single error of \$364.05 for which he got an allowance, in his administrator's settlement, as for money paid out on his decedent's liability for railroad stock, when the widow of the decedent furnished the money out of her own means to pay it, will cover all the balances which he set up in his answer.

Upon a fair adjustment of his accounts as apparent from the proof in this cause he has no just set-off or counter-claim as to the debt sued upon.

And even if the \$1,000, reserved in the trust deed to Wilson was due to appellee as administrator how he can set it off against an individual debt of his own is not perceptible unless he was in advance to the estate, but to do so would be an improper and illegal conversion of the assets. The money would be due the widow and heirs of Wilson immediately had he collected it, for the two years allowed for winding up a decedent's estate had long since elapsed, and no cause for returning it is averred or proved.

Wherefore, the judgment is reversed, with directions to reject the answer and for further proceedings consistent with this opinion.

Turner, for appellant.

Yeaman, for appellee.

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R. G. SHARP'S ADMINISTRATOR v. DANIEL HARPER.**Bonds—Principal and Surety—Sec. 2, Ch. 71, Rev. St.**

Section 2, Ch. 71, Rev. St., is merely a reenactment of the acts of 1820, and holds a surety on a constable's bond liable in so far as it operates to indemnify the sheriff from loss or damage on account of the illegal or negligent acts of the constable.

Officers—Sale of Office.

A contract between a sheriff and constable reciting 'that the fees and emoluments of the said office of sheriff, arising and which have arisen, etc., amount to more than \$700.00, which Sharp (constable) is to retain for his service except \$700.00 to be paid Harper \$350.00 December 25, 1863, and \$350.00 December 25, 1864; held to be a sale and deputation of the office of sheriff, and void as to that amount.

Same—Liability of Sureties.

Sureties on the bond of a defaulting constable, are not liable for more than the actual amount the sheriff would be compelled to account for, notwithstanding the recitations of the bond.

Same—Damages.

And the sheriff could only recover such actual damages as he would sustain by reason of the constable's failure to collect the taxes and not consequential damages.

APPEAL FROM BATH CIRCUIT COURT.

March 2, 1870.

OPINION OF THE COURT BY JUDGE PRYOR:

Harper being sheriff of Bath county appointed Sharp his deputy, and agreed with him that he should be allowed to transact all the business and discharge all the duties of the office of sheriff in a designated portion of said county. He took from him a bond with Sudduth Caldwell and Foster as his sureties, conditioned that the duties of the deputy should be truly and faithfully performed and that he as sheriff should be saved and held harmless from loss or damage accruing from any act, or failure upon the part of the deputy to act, in his official capacity in the designated territory. The bond recited that "the fees and emoluments of the

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said office of sheriff arising and which have arisen in said part of Bath amount to largely more than \$700, all of which he (Sharp) is to retain for his services except the sum of \$700 which he is to pay Harper \$350 by the 25th day of December, 1863, and \$350 by the 25th day of December, 1864. Should said R. G. Sharp be prevented from discharging the duties of sheriff by the armies or armed men of the so-called Confederate states, then an adjustment is to be had so that Sharp's compensation will be in proportion to fees and emoluments earned, and \$350 per year and what they would have been if not so prevented. The securities being bound for the \$350 per year, as well as for acts of said R. G. Sharp, who is appointed deputy for Harper's term of office which is two years beginning on the first Monday in January, 1863." This suit was brought upon this bond, to recover large amounts of money alleged to have been collected by Sharp and not accounted for, and which amounts the principal sheriff had been compelled to pay, and also for the \$700 agreed to be paid by the deputy in termination of his appointment as such. Among other defenses, the sureties pleaded that the contract between Harper and Sharp was in effect a sale of the deputation of the office of sheriff, and hence that their bond was void. They also interposed *special* pleas of *non est factum*. These defenses were overruled, and judgment having been rendered against them for a large amount they have appealed to this court.

Section 2, Chapter 7, Revised Statutes, declares, "That no office or post of profit, trust or honor under this Commonwealth, whether civil or military, legislative, executive, ministerial or judicial, nor the deputation thereof, in whole or in part shall be sold or let to farm, by any person holding or expecting to hold the same." *Section 3* declares "Every contract or security made or obtained in violation of the preceding section shall be void, except that a bond of indemnity from a deputy and his sureties to a sheriff, sergeant of the Court of Appeals, clerk or marshal shall not be void." Prior to the enactment of a statute in 1820, providing "that all bonds of indemnity hereafter executed by any deputy sheriff shall be good and valid in law, and any law declaring void such contracts is hereby repealed." All bonds of indemnity subsidiary to or in any way connected with the sale of an office or the deputation thereof were held to be inoperative, but since the enactment of that statute the rulings of this court have been different.

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Baldwin v. Briges, 2nd John J. Marshall, 7; *Combs v. Brashears*, 6th J. J. Marshall, 633; *Konns v. Davis*, 6th B. Monroe, 278. In these cases it is held, that in so far as the bond secures to be paid all or any part of the consideration for the sale of the office or deputation, it is void because inconsistent with public policy and repugnant to the principles of the common law, but that under the operations of the statute of 1820 in so far as the bond covenants to indemnify the principal from loss or damage on account of the illegal or negligent acts of the deputy it is enforceable. The second section of chapter 71 of the Revised Statutes is a substantial re-enactment of the act of 1820, and as that act had long before the adoption of the Revised Statutes been judicially construed, we conclude that the legislature intended that no change should be made in the law regulating such contracts. The court below, therefore, properly held the appellants responsible for the damages sustained by appellee by reason of the misconduct or negligence of the deputy in the discharge of his official duties.

We are, however, of opinion that the contract between Harper and Sharp was in effect a sale of the deputation of the office of sheriff. The agreement was that Sharp was to pay the gross sum of money as a consideration for the right to discharge all the duties and take all the fees and emoluments arising therefrom in a designated portion of the county of Bath, and this right was to continue during the entire term of the principal. The latter could not discharge or remove the deputy without a violation of his contract, nor did he even review the right to superintend the discharge of the duties of his office of sheriff within the district farmed to Sharp. These facts appear from the face of the bond itself, and according to the rule prescribed by this court in the case of *Lewis v. Knox*, 2nd Bibb, 453, states the transaction as coming within the inhibitions of the 1st section of chapter 71, R. S. The bond is void in so far as it is intended to secure the payment of the \$700 agreed to be paid by Sharp to Harper, and it was error to render judgment against appellants for that amount. The pleas of *non est factum* are not only not sustained, but are fully disproved by the petition of the securities filed against their principal in which they allege the execution of the bond, and sue out an attachment against the estate of the principal to secure themselves against anticipated loss on account thereof. The fourth and sixth items adjudged against appellants are clearly erroneous.

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The court also erred in adjudging the securities liable for the amounts of certain executions collected by Sharp, but which neither the petition nor amended petition charges were collected from parties residing, or having property within the district in which Sharp was to act as deputy. They should also have been charged with no more upon an execution collected by him and not accounted for, than Harper has been or will be compelled to pay. Otherwise they will be held to account for the fees and commissions to which the deputy himself was entitled.

As to the uncollected State and county taxes in Sharp's district, Harper is entitled only to recover such actual damages, as he sustained by reason of Sharp's failure to collect and pay them over. If the tax-payers were good and solvent, it was Harper's duty to proceed to collect from them. This fact he seems to have fully understood, as the commisisoner's report shows that he did collect over \$800 after Sharp ceased to act as his deputy. As the judgment does not conform to the principles of this opinion, it must be reversed. Upon the return of the cause the parties should be allowed, in case they desire to do so, to amend their pleadings. Reasonable time should also be given for further preparation. Further proceedings will be had consistent with this opinion.

Thomas Turner, Richard Reid, for appellant.

Young, Nesbitt & Gudgell, Simpson, for appellee.

COMMONWEALTH v. THOMAS JOHNSONS**Intoxicating Liquors—Statute Regulating, to Whom Applicable.**

The statute prohibiting the sale of intoxicating liquors, is held to apply generally to all minors under twenty-one years of age, including those who have neither father, mother nor guardian.

APPEAL FROM PIKE CIRCUIT COURT.

December 8, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The act of March 2, 1860, "to regulate the sale of spirituous

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liquors" (*Myers Suppt.*, 517) declares that "no person shall sell to any white person under the age of twenty-one years, any spirituous or vinous liquors or the mixture of either, unless by the written consent or request of the father of such minor if living, or the mother or guardian of such minor if the father be dead," and denounces against any one so offending a fine of fifty dollars for each offense. The indictment in this case sufficiently and in apt terms alleges the facts necessary to constitute the offense, if the intention of the statute is to prohibit the practice of selling liquors to white minors generally, with only an exception as to those having parents or guardians who may consent to or request the selling in writing; but if the intention was only to prohibit the selling to minors of that class, and not to those having neither father, mother nor guardian, then the indictment is defective in not stating facts showing the minor Taylor, to whom the appellee is charged with selling liquor, to have been of the particular class embraced by the statute.

We regard the statute as intended for the protection of white minors generally from the evil practice described, and therefore think the indictment sufficient, and that the demurrer ought not to have been sustained.

Wherefore, the judgment is reversed, and the cause remanded with instructions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

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BENJAMIN CLOSTERMAN v. COMMONWEALTH.

Indictment for Selling Liquors to Minor—Sufficiency.

An indictment for unlawfully selling liquors "to James McCourt, he the said James McCourt, Jr., then and there being a white person under the age of twenty-one years, and which said liquor so sold as aforesaid was * * * so sold by the said Closterman without either the written consent of the father, mother, or guardian of the said James McCourt, Jr., or either of them," is held sufficient for the offense charged.

Same—Idem Sonans.

The three names used is held to mean the same "individual," by the use of the word "the said," preceeding same.

Same—Bar to a Subsequent Prosecution.

Such an indictment is held to be sufficient to constitute a bar to any subsequent prosecution for the same offense.

Same.

Nor would the plea avail, that it did not set out the father was living, or if dead, that he was under the control of his mother or guardian.

Indictment for Selling Liquor to a Minor—Instruction.

In a prosecution for selling liquor to a minor, an instruction that "the accused was required by the law to know that McCourt was a minor, and that his ignorance as to his age, or the belief that he had reached the age of twenty-one years, could neither justify nor excuse the inhibited selling," was not erroneous.

Same.

Nor an instruction that "the sale by an agent, authorized by the accused to sell to the minor, was as much a violation of the law, as though he had made the sale himself."

APPEAL FROM KENTON CIRCUIT COURT.

December 7, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

This indictment charges that the appellant did unlawfully sell spirituous and vinous liquors, &c., "to James McCourt, he, the said

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James McCourt, Jr., then and there being a white person under the age of twenty-one years, and which said liquor so sold as aforesaid was * * * so sold by the said Benjamin Closterman without * *. * either the written consent of the father, mother or guardian of the said James Court, Jr., or either of them."

It is objected that the description or identification of the minor to whom the liquor was sold is uncertain and indefinite, that he is first called James McCourt, then James McCourt, Jr., and then James Court, Jr., and that these various appellations may or may not be applied to the same person. There can be no doubt, we think, from the language of the indictment, that the three names are intended to be, and are applied to the same individual, James McCourt, who is a white minor, is the "said" James McCourt, Jr., to whom the liquor was sold, and is the "said" James Court, Jr., to whom appellant did not have the written authority to sell. The language used will admit of no other intelligible construction. Thus stated it seems to us that the offense charged is set forth with such certainty as to apprise the accused of the nature of the accusation, and to constitute a bar to any subsequent prosecution for the same offense, and no greater degree of certainty than this is or ought to be required. *Commonwealth v. Perrigo, 3rd Metcalf, 5.*

We cannot agree that the indictment is defective because it does not set out specifically, either that the father of the minor was living, or if dead, that he was under the control of his mother or guardian, and then negative directly the idea of the written consent or request of the identical person having the legal right to give the same. It is expressly alleged that the accused did not have the written consent of the father, mother or guardian of the minor, or of either of them. Construe this language as you will, and it cannot possibly be made to appear that the accused comes within either one of the three exceptions contemplated by the statute. The demurrer to the indictment was therefore properly overruled. The court did not err in instructing the jury, that the accused was required by the law to know that McCourt was not a minor, and that his ignorance as to his age, or his belief that he had reached the age of twenty-one years, could neither justify nor excuse the inhibited selling, nor in the instruction that the sale by an agent authorized by the accused to sell to the minor, was as much a violation of the law, as though he had made the sale himself.

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We discover no error in the record affecting the substantial rights of the appellant. The judgment is, therefore, *affirmed*.

Mooar, for appellant.

F. M. DODD'S ADMR. v. S. S. STORY.

Resulting Trust—Parol Agreement for Purchase of Land—Entry and Occupancy.

A tract of land was entered by three patentees, but the patent was issued in the name of only one. Dudd entered on and used one-third of the land, for some forty years without interruption. Held that a trust resulted to him in one-third of the land and his entry regarded as an appropriation, with the assent and approbation of appellee.

APPEAL FROM GRAVES CIRCUIT COURT.

December 14, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

In the answer of appellee filed in the suit of Kelsoe & Clark against him and others, it is stated that decedent, William Story, and himself entered a quarter section of land in partnership, each furnishing an equal portion of the money, and the patent was issued to defendant, S. S. Story, and by agreement, J. C. Dodds was to take his portion off the southeast corner of said quarter. This answer was subscribed and sworn to by appellee.

The evidence shows that one-third of said quarter section was laid off to decedent, that he entered upon it some forty years before appellee's cross petition was filed, and lived on it up to his death, which occurred in 1860.

The language of the answer herein quoted, seems to admit of no other construction, than that each one of the partners paid at the time, one-third of the cost of entering the land, and although the patent issued in the name of S. S. Story, a trust resulted to decedent for the one-third of the tract, and the entry on and

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occupancy of it by him so long without interruption, must be regarded as an appropriation of that part of the tract by him, with the assent and approbation of appellee.

It is clear from the evidence that decedent at his death was indebted to appellee, but as the amount is not ascertained, he should be permitted to verify his claim and present it for allowance.

But the judgment in appellee's favor for the land cannot be sustained. A lien, or incumbrance on it could not be created by parol, it must for the reasons herein be reversed, and the cause remanded with directions to dismiss appellee's cross petition, and for further proceedings consistent herewith.

Stubblefield, for appellant.

A. R. Boone, for appellee.

THEODORE DREIDEL v. M. L. VIRDEN, ET AL.

Factors and Brokers—Purchase by One of Commission Business—Liability for Consignment.

A commission merchant, who handles goods on consignment, transferred his business, by sale, to his vendee. He had on hand goods consigned to him for sale. Held that the purchaser became liable to the consignor to the extent of the goods on hand at the time of the transfer.

APPEAL FROM JEFFERSON CIRCUIT COURT. CHY. DIV.

December 6, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

Withers was a commission merchant in the City of Louisville, and was the agent of Dreidel for the sale of Hummel's extract of coffee, and about the 1st of March, 1869 had on hand something less than 300 boxes of said extract, for which there remained due to Dreidel \$186.22.

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On the 1st of March, 1869, Virden became the successor of Withers, who, from that time, followed a different business. The two parties however carried on their respective avocations in the same house until about the middle of the following May.

Withers about that time left Louisville without settling with appellant, and has never returned. A day or two afterwards Virden changed his place of business and carried with him the extract of coffee consigned by appellant to Withers for sale.

On the 18th of June, Dreidel brought this suit, and attached such of said extract as remained in the hands of appellees, and sought to subject the same to the payment of his claim against Withers. By the answer appellees claim to have purchased said extract from Withers in the usual course of trade and in perfect good faith and denied the right of Dreidel to subject it to the payment of his said claim against Withers. The chancellor dismissed appellant's petition and discharged his order of attachment.

According to the joint circular of Virden and Withers issued March 1st, Virden became the successor of Withers in the commission business, and if he acquired the possession of the coffee at that time, he held it as the successor of Withers and as the agent of Dreidel, and not in his own right.

If he did purchase it on the 14th of April, the fact that he purchased the whole lot at one time, and for greatly less than its market retail price, rebuts the idea that the purchase was made in the usual course of trade.

When we consider the fact that Virden removed his place of business the day after Withers left Louisville, and for the first time reduced the goods attached to his individual possession so far as it appears from this record, we are forced to conclude that the whole transaction of sale was fraudulent and that Virden participated in the fraud, and therefore, that the goods should be subjected to the payment of Dreidel's claim. Wherefore the judgment dismissing his petition and discharging his order of attachment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Demblitz & Wehle, for appellant.

Mix, for appellee.

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H. S. PARKER, GD'N., v. JOHN L. HAWKINS.

Equity—Sale of Infants Land, With a Contingent Interest.

A petition for the sale of an infant's land, in which there is a contingent remainder interest, must allege that the interests of the claimants of the future estate would be best subserved by the sale of the entire and absolute title to the property.

Same—Judicial Sale—Purchaser not Bound to Perform.

A purchaser of such an interest, unless the requirements are complied with, would not be bound to complete his purchase.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 12, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Nannie Parker, an infant, owns about thirty-seven acres of land in Fayette county, to which she derives title through the last will and testament of her grand-father Hezekiah Ellis, dec'd. Certain other persons' heirs-in-law and devisees of said Ellis have contingent interest in said land depending upon the death of said Nannie before she marries or reaches the age of twenty-one years. The particular persons who may take such interests cannot now be determined, on account of the non-happening of the event upon which the same depends. By an ex parte proceeding in the Fayette Circuit Court under the provisions of the 86th chapter of the Revised Statutes, H. S. Parker, the statutory guardian of said Nannie procured a judgment directing the sale of her said land for the purpose of reinvestment, and at the sale made under this judgment, the appellee Hawkins became the purchaser at the price of eighty-five dollars per acre. He failed to make the cash payment or execute bonds for the deferred payments as required by the judgment, and in response to a rule to show cause why he should not be compelled to complete his purchase, he sets up various reasons, the substance of all of which is that the proceedings by which the judgment was obtained are so irregular, that the court cannot pass to him a perfect title to the land. Under

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the provisions of the Act of the General Assembly of August 3rd, 1862, Myers' Supplement, R. S., page 426, it is lawful for any person holding a present interest in real estate, in the manner in which the infant Nannie holds the land in question to institute proceedings in the proper court of the county in which the same is situated for the sale of the entire and absolute title thereto. "And if upon the hearing of the case it shall appear to the satisfaction of the court, that the interests of all the claimants, *present and future* would be subserved by a sale of the entire interest in said real estate, * * * it shall be the duty of such court to render a decree accordingly; and the purchaser of such estate * * * upon complying with the terms of the sale prescribed by the decree shall be vested with all the title of the present and future or contingent claimants to said real estate, etc." The 2nd section of the act authorizes the proceeding to be prosecuted by the owners of the present interest, without making the contingent remaindermen parties. And when the present owners are infants or married, the 4th section provides that the same shall be made in conformity with the 86th chapter of the Revised Statutes.

In all proceedings under this chapter a strict compliance with its provisions has been uniformly required by this court. The act of 1862 authorizes the sale of the interests of certain classes of remaindermen in certain estates by proceedings to which they are not made parties and in which they have no opportunity of being heard, and it seems to us that in such proceedings at least a substantial compliance with the material provisions of the act should be required. In this case, neither the petition of the appellant, nor the report of the non-commissioners upon which the judgment directing the sale of the land purports to be predicated, states directly or inferentially that the interest of the claimants of the future estate would be subserved by the sale of the entire and absolute title to the property. The power of the court to make such sale is by the statute made to depend upon the fact "That the interests of all the claimants present and future would be subserved" thereby. No such fact appearing in this record, we are of opinion that the rule against Hawkins was properly discharged. This conclusion does not in any degree conflict with the rulings of this court in the cases of *O'Neal v. Bannon*, 4th Bush, 23, and *Terrell v.*

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Spence and wife, 3rd Bush, 638. In both of said cases it was alleged and proven that the interest of those who claimed the estate both "*present and future*" would be subserved by the sale of the entire estate.

Judgment *affirmed*.

Kinhead & Buckner, for appellant.

Harrison, for appellee.

MAYSVILLE & LEXINGTON TURNPIKE CO. v. G. C. KNIFFEN ET UX.

Damages—General Rule.

Vindictive or exemplary damages are such as are given against a defendant, who, in addition to the trespass, has been guilty of acts of outrage and wrong which cannot well be renewed by compensation in money.

Same—Vindictive or Exemplary Damages.

Such damages can only properly be given in cases of trespass or tort, accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice.

Same—Instruction—Turnpikes.

Where a turnpike company may be guilty of not protecting its bridge-ways with side bars as a protection, and the plaintiff did by driving carelessly is injured by precipitation over same, an instruction predicated on the liability of the defendants for not keeping same in good repair is misleading and erroneous.

APPEAL FROM BOURBON CIRCUIT COURT.

December 10, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

This was an action by Kniffen and wife against the Maysville & Lexington Turnpike Company to recover damages alleged to have been sustained by Mrs. Kniffen by reason of the rockaway

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or carriage in which they and others were driving having been precipitated over a bridge or causeway on the road of said company across a mill race, near the town of Paris.

The jury were in effect instructed by the court that if the road was out of repair to such an extent as to render travel thereon dangerous, that this fact was known to the company and that they failed to repair the same after reasonable opportunity to do so, and that when appellees met with the accident complained of they were driving on the road with reasonable care and prudence, and that the accident was the result of the insecure condition of the road, that they might in their discretion give exemplary damages. The objection to this instruction is not that it is incorrect as an abstract proposition of law, but, that it was not authorized by the evidence in the case and was therefore calculated to mislead the jury. It appears from the evidence that the plaintiffs were not driving carefully and prudently at the time of the accident, and that the same might have been easily avoided by the use of ordinary care and vigilance. Further that whilst the bridge or causeway was not properly protected by a sufficient wall upon either side of the same, that it was out of repair to that extent, which indicates such want of regard for the safety of the travelling public as will raise a presumption of malice.

Vindictive or exemplary damages "are given against a defendant, who in addition to the trespass has been guilty of acts and outrage and wrong which cannot well be renewed by compensation in money," and can only properly be given in cases of "trespass or tort, accompanied by oppression, fraud, malice, or *negligence so gross as to raise a presumption of malice.*"

Bon. Laaw Dic., vol. 1, page 361; 2nd Duvall, 056; Sedgewick on Damages, 3rd Edition, page 26.

The facts developed by this record fail to bring this case within either of these rules, and in our opinion the most that the appellees can legally claim, if anything, is compensatory damages. It was therefore erroneous to instruct the jury with a view of any other possible result, and as we cannot determine to what extent the jury may have been influenced by the instruction under consideration, we must reverse the judgment appealed from, and remand the cause for another trial upon principles consistent with this opinion.

Huston, Alexander & Turney, for appellant.

Hanson & Hanson, Davis, for appellee.

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A. G. TALBOTT *v.* N. T. LEE.**Contracts—Mistakes Corrected.**

Relief can only be granted on the ground of mistake in a written instrument when the mistake is plainly and clearly proved.

Same.

The instrument should be treated as a full and correct expression of the intention of the parties, until the contrary is established beyond reasonable controversy.

APPEAL FROM BOYLE CIRCUIT COURT.

December 7, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellant, having by his agent, P. M. Talbott, sold and delivered to the appellee, in 1857, a slave named Brown for the consideration of \$1000, executed to the appellee his bill of sale, containing a covenant warranting the slave to be sound in body and mind; and the slave having proved to be afflicted with a disease, which materially impaired his value, this action was brought by the appellee, in November 1858, for the recovery of damages for the breach of the warranty.

The appellant by his answer and cross-petition, sought to reform and correct the written memorial of the contract, on the ground that the warranty of soundness, was inserted in the writing, contrary to the agreement of the parties, and executed by his agent through a mistake; and therefore to avoid the liability imported by it. The court, on the evidence adjudged this ground of defense not sustained; and upon a trial of the question of damages, rendered a judgment for the plaintiff for \$350, from which this appeal is prosecuted.

There is some contrariety of evidence as to the character and extent of the disease of the slave at the time of the contract, and its effect on his value; but there does not appear to be any preponderance of the evidence against the amount of damages found by the court, as to authorize a reversal of the judgment on that ground.

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Nor did the court err in refusing to reform the written contract. Relief should only be granted on the ground of mistake in a written contract when the mistake is plainly and clearly proved. But if the proof is unsatisfactory, and the mistake not made entirely plain, equity will withhold relief upon the ground that the writing ought to be treated as a full and correct expression of the intention of the parties, until the contrary is established beyond reasonable controversy. (*1 Story's Equity Jurisprudence* sec. 162; *Graves v. Mattingly*, 6 Bush, 361). We do not think the alleged mistake in this case is so established. Against the plain import of the writing, and some corroborative facts, the affirmative allegation of mistake, which is expressly controverted by the reply of the appellee, is not supported except by the testimony of Talbott, the agent who made the sale; and while his testimony is explicit as to his own intention to sell the slave without devolving on his principal, responsibility for his soundness, and that he endeavored in good faith to give the appellee correct information as to the health and physical condition of the slave, the facts proved by him, conduce rather inferentially than directly to establish an agreement on the part of the appellee to insure the usual warranty of soundness in the contract, which, it is reasonable to suppose, he would, as a prudent purchaser, have required, from the price he paid, and the reasons he had for doubting the soundness of the slave.

Upon the whole, we must regard the unambiguous stipulations of the writing as containing the best evidence of the terms of the contract.

Wherefore the judgment is *affirmed*.

Durham, for appellant.

Quisenberry, for appellee.

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L. O. PEELER, ET AL *v.* R. WHITE, ET AL.

Courts—Jurisdiction of Quarterly Court.

A petition in the circuit court on a judgment for \$77.78, without allegations that the defendant owns real estate in the State, subject to the debt, is erroneous. The action could only be brought in the quarterly court.

APPEAL FROM CALLOWAY CIRCUIT COURT.

December 13, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

A judgment was recovered by Peeler in the quarterly court of Calloway county against appellants for \$77.78, and this suit was brought in the Circuit Court of Calloway county by Peeler's assignee against said party for a discovery, and to garnishee debts alleged to be owing to some one of the defendants by other persons.

There is no allegation in the petition that appellants own any real estate in this Commonwealth subject to said debt, and the quarterly court could have afforded all the relief claimed in the petition, and the allegations of the petition are not sufficient under *Sec. 474 of Civil Code*, to give the Circuit Court jurisdiction.

Wherefore the judgment dismissing the petition is *affirmed*.

Stubblefield, for appellants.

Brown & Miller, for appellees.

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JOSIAH VEACH v. W. H. PERKINS.

Attachment—Instruction as to Damages.

An instruction in an attachment proceedings, to allow the jury to assess damages for any remote injury resulting from the interruption of the regular course of the plaintiff's business, is erroneous and misleading.

Attachment—Damages for Wrongful Suing Out.

Recovery for the wrongful suing out of an attachment can only be had for such damages as are natural and proximate. And does not extend to cover supposed losses sustained by a mere derangement of the business.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 9, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The same instruction given in this case qualifying and explaining the first, substantially informed the jury, that they were authorized, in their finding, to estimate and allow damages to the plaintiff for being interrupted in the course of his business in consequence of the attachment. It is well settled that in a case like this, not proceeding for a malicious abuse of the process of the law, the plaintiff can only recover on the attachment bond such damages as are natural and proximate; and that the defendants responsibility does not extend to losses supposed to have been sustained by the mere derangement to the business of the plaintiff, caused by the attachment, or of merely contingent or prospective profits, of which it may have operated to deprive him (*Pettit & Owens v. Mercer*, 8 B. Monroe, 51; *Carpenter v. Stevenson*, 6 Bush, 259). This case is not analogous to the one last cited where a particular and immediate injury was alleged and shown, by preventing the use of materials for a building, already prepared to comply with a contract. The ruling of the court in this case was such as to allow the jury to assess damages for any remote injury resulting from the interruption of the regular course of the plaintiff's business, and in that respect

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was misleading and erroneous for the reason we have indicated and according to the authorities cited.

Wherefore the judgment is reversed and the cause remanded for a new trial consistent with this opinion.

Veech, Ray & Hardin, Sweeney & S., for appellant.

James, for appellee.

JOHN A. TRUMBO, ET UX v. JOHN D. MAGOWAN'S ADMR., ET AL.

Wills—Life Estate with Remainder Interest.

A will providing "I bequeath to * * * my beloved wife * * * during her life, to have and use the same to her own use, having no legitimate children," followed by a clause "after the death of my wife, the estate she leaves, to descend to my granddaughter," is held to create a life estate only, though the legatee provided for, died before the testator.

Same—Devise Void.

The devise to the granddaughter, by her death, being void, the remainder interest passed by the will to the testator's brothers and sisters.

APPEAL FROM BATH CIRCUIT COURT.

October 12, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The main question in this case is whether Mrs. Trumbo, who was the wife of John D. Magowan at the time of his death, is entitled under his will to more than a life estate in the property devised. And *second*, if he died intestate as to any part of his personal estate, whether his widow can take a distributable, share, one half thereof, the testator having died without issue, or can she take any part of the property undisposed of by the will.

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The following is all of the will that it is necesary to quote to present the questions.

"I will and bequeath to my dearly beloved wife Minerva McGowan the whole of my estate, whatever it may be at the time of my death, both real and personal, during her life, paying my just debts, to have and to use the same to her own use and benefit, having no legitimate children.

"I will, after the death of my wife, the estate she leaves of mine, the same shall descend to my grand-daughter, Annie Cooper, her mother being illegitimate."

The grand-daughter had died before the will was published without issue, and the devise to her as is conceded by all is void.

The administrator with the will annexed brought this suit in equity for a construction of the will, and the direction of the chancellor in making distribution of the estate, making the widow, and the brothers and sisters of the intestate defendants.

The widow who has, since the institution of the suit, intermarried with John Trumbo, claims the whole estate absolutely under the will, and if she cannot get that, then she claims as widow one-half thereof, it all being personal estate, because as she says, if she only takes a life estate, then the testator made no testamentary disposition of the estate in remainder, and under *section 11, chapter 30, 1 R. S., 423*, of the Revised Statutes she is entitled to the one-half thereof. The heirs resist this claim of the widow, and assert that she is only entitled to a comfortable support out of the estate during her life, and at her death the estate will pass to them.

The court below adjudged that the appellant Mrs. Trumbo was only entitled to an estate for life under the will and that if the annual profits of the estate should not be sufficient for her comfortable maintenance, then so much of the principal as should be required therefor should be appropriated to her support, and retained the cause on the docket, to make all proper orders and judgments to effectuate that purpose, and further adjudged that the devise to the grand-daughter, who was then dead, was void, and consequently, the estate in remainder passed to the brother and sisters who were the heirs of testator.

And of that judgment Mrs. Trumbo and her husband complain.

As the grand-daughter died unmarried and childless and was dead before the publication of the will we concur with the circuit

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judge that the devise to her was void, and that whatever of the estate the wife could not take passed to the heirs of the testator. And we also concur with him that she only took a life estate, subject to her comfortable support. In the first clause of the will the estate is expressly limited to the wife for life, and in the next he attempts to dispose of the remainder to his grand-daughter, of whose death he was at the time no doubt ignorant.

It only remains to consider whether the widow is entitled to the one-half of the remainder of the estate absolutely under *section 11, chapter 30, 1 R. S., 423.* .

Under the will she claims and takes a life estate in the whole. It clearly appears in this will that a life estate in his property was all the testator intended his wife should have; that he gave her in express terms—and having failed to renounce the provision made for her, she can claim no more of the estate than the testator gave to her.

Under *section 20, chapter 106, 2 R. S., 462*, it is provided that unless a contrary intention shall appear by the will, such real or personal estate, or interest therein as shall be comprised in any devise in such will shall fail, or be void, or otherwise incapable of taking effect, shall not be included in the residuary devise contained in such will, but shall pass as in case of intestacy. The testator did not die intestate as to the life estate which appellant takes, but to permit her to take one-half the estate as a distributable share would be allowing her to claim under and against the will, which cannot be done.

Judgment affirmed.

Lacy, Apperson & R., for appellants.

Nesbitt & G., Reid, for appellees.

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B. W. THOMAS ET UX V. SELLER & Co.

Judgment—Against Feme Covert.

A judgment against a wife "to be levied or collected out of her general estate," is erroneous. It should point out what property or interest of hers is subject to the debt and specifically order it to be sold.

APPEAL FROM JEFFERSON CIRCUIT COURT, C. P. DIV.

October 4, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

This was an ordinary action upon a promissory note for \$435, executed by the appellants, Nancy Thomas and her husband, B. W. Thomas, to the appellees for a carriage. B. W. Thomas made no defense, and a judgment was rendered against him by default; but his wife pleaded her coverture, at the time of the execution of the note, as a bar to the action as against her. Subsequently the pleadings were so amended as to present the issue, whether the carriage was necessary for the use of Mrs. Thomas and her family, considering her circumstances and station in life—the fact being disclosed that she was the owner of some real and personal estate.

Upon that issue a verdict and judgment were rendered for the plaintiff, which the court refused to set aside on a motion for a new trial. But that judgment being strictly personal, the court on the motion of the plaintiffs so far modified it as to direct that execution issue thereon "to be levied or collected out of the general estate of said defendant Nancy Thomas and not otherwise." To reverse that judgment Thomas and wife prosecuted this appeal.

The principal, and as we conceive, the only important question presented for our determination is, as to the form and character of the judgment. Although generally a married woman cannot, by contract render, even her general estate liable for her debts, she may, under the *first section of article 2, of chapter 47, of the Revised Statutes*, in a particular manner and with her husband's assent and co-operation, bind such estate for necessities for herself or any member of her family; but an ordinary personal judgment

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is not the appropriate remedy for enforcing such a liability (*Agnew et ux v. Williams*, 1 Bush, 4; *Curd v. Dodd et al.*, 6 Bush, 681). But instead of leaving it to the sheriff, or other collecting officer, to determine what estate of the *feme covert* may be liable to be levied on and sold, the judgment should point out what property or interest of hers is subject to the debt and specifically order it to be sold (*Marshall v. Miller & Metcalfe*, 333). This, the court omitted to do in the case; and for its failure to do so, the judgment is deemed erroneous and must be reversed.

It would have been proper to transfer the case to equity, but the affiant having successfully resisted a motion of the appellees, made for that purpose, are not in a position to complain of the court in overruling the motion.

But, for the error indicated, the judgment is reversed, and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

Duke, Richards, for appellant.

Tyuman, for appellees.

G. S. MITCHELL v. ANTHONY PHELPS ET AL.

Pleading—Petition by Surety on Guardian's Bond Insufficient—Demurrer.

A petition by a surety, against co-sureties on a guardian's bond, for contribution, that does not allege the insolvency of the principal, nor other reason why the amount could not be made out of him, does not constitute a cause of action, and is demurrable.

APPEAL FROM JESSAMINE CIRCUIT COURT.

December 21, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Luther A. Martin having been appointed statutory guardian by the Jessamine county court of Cornelia and LaBell Martin on the

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6th of August, 1858, executed bond with Anthony Phelps and Lee W. Spears as his sureties, covenanting that said Luther A. Martin would faithfully discharge the trust of guardian to said minors, in all respects as required by law.

In a short time after his appointment Martin instituted suit in the Jessamine circuit court under *chapter 86 of the Revised Statutes*, praying for a judgment for a sale of a slave of his wards, executed a covenant as prescribed in sub-division 3, section 2, article 3, of said chapter, with appellant as his surety, stipulating for a faithful discharge of all his duties as guardian under said act, and under any order, or decree of the court in pursuance thereof.

After alleging the foregoing facts in this suit brought by appellant against Phelps, and the executors of Lee W. Spears, he having died, he further alleges that after the sale of the slave under the judgment aforesaid, said Martin charged himself as guardian with the proceeds of the sale of said slaves as is shown by a settlement made by him with the county court of Jessamine county. That said wards having arrived at full age brought a suit against him for the price received for said slave by the said Martin as their guardian on the covenant executed by appellant as his surety in the circuit court, and recovered judgment therefor amounting to \$456 besides costs expended by him, and he was compelled to pay the same, and charges that the sureties on the bond taken by the county court are responsible to him for said sums which he had been compelled to pay, or if not for the whole amount, they were at least legally bound to contribute as co-sureties, and prayed judgment accordingly.

Appellees demurred to the petition which was sustained, and appellant having failed to amend the same it was dismissed, and he has appealed.

If appellant's theory be the correct one that appellees and himself are co-sureties of Martin, and certainly that is the utmost for which they could be responsible. Their liability to him would be contingent and depend on the insolvency of Martin, and as it is not alleged in the petition that Martin, the principal, was insolvent, nor any other reason why the money therein demanded could not be made out of him, it failed to show a cause of action against appellees, and was properly adjudged insufficient on demurrer. *Daniel v. Ballard* 2 Dana, 296; *Bolling v. Doneghy*, 1 Duvall, 220.

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Whether or not appellees can be compelled to contribute to appellant is a question, which has not been directly decided by this court, or if it has been we are not aware of the case. In *Johnson's heirs v. Chandler's heirs*, 15 B. Mon., 584, the question was alluded to; but as it was not directly presented for adjudication, the court declined to express any opinion on it.

In *Withers, &c., v. Heckman*, 6 B. Mon., 293, the question whether the sureties of the guardian taken by the county court could be made jointly responsible to the wards with the surety taken by the circuit court in a suit by the guardian to sell the land and slaves of his wards, for the proceeds, and it was decided in the affirmative. Still, that is not precisely the question raised in this case; and as the petition was properly dismissed for the reason stated, we need not anticipate a vexed question, not now absolutely necessary to be decided.

Wherefore, the judgment is *affirmed*.

Bronaugh, for appellant.

Shanklin, for appellee.

WARREN L. PREWITT v. COMMONWEALTH.**Appeal and Error—Jurisdiction of Appellate Court.**

Where the statute gives no right of appeal from the county court to the circuit court, an appeal from the latter to the appellate court, is erroneous and will be dismissed.

APPEAL FROM MEADE CIRCUIT COURT.

December 7, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

An appeal does not lie to the circuit court from an order of the county court, granting or refusing license to keep a tavern. Sections 15, 16 and 20 of the Cade take away the jurisdiction given

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to circuit courts in such cases by *section 10, article 1, chapter 99, Revised Statutes*, and confer it upon this court, *Bochler v. Commonwealth, 1 Duvall, page 3*.

The circuit court of Meade county had no jurisdiction of the appeal prosecuted from the order of the county court granting to appellant license to keep a tavern, and that fact of itself deprives this court of jurisdiction to entertain this appeal, and the same is for that reason dismissed.

Lewis, for appellant.

J. C. CALHOUN ET AL V. KING & KING.

Trial—Motion to Suspend Judgment.

The entry of a motion for a new trial on the motion docket, and not prosecuting it in court, or having it entered on the minute or order book, is not sufficient to suspend a judgment.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

December 7, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The *ex parte* entry of the motion for a new trial on the motion docket out of court and never prosecuting it in court or having it, with the grounds of it, entered on the minutes or order book or calling it up for adjudication, was not sufficient to suspend the judgment. And the execution on that judgment was therefore legal, and the judgment of the circuit court to that effect was consequently right.

Wherefore, the judgment is *affirmed*, with damages.

Rodman, for appellant.

King, for appellee.

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SAMUEL CUMMINGS *v.* B. HOMANS & Co.**Attachment—Preference of Creditors.**

The securing of a creditor, who is not a party to any scheme by a debtor to prefer creditors, and where both parties show an honest intent, not grounds for an attachment.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 29, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Homans, a banker, doing business in Cincinnati, and residing in Campbell county, Kentucky, failed in business on the 26th of August, 1869. On that day this action was brought by Cummings in the Campbell circuit court to recover a balance of \$3,846.35 on a deficit account, and an order of attachment was sued out on the ground that Homans was about to sell, convey or otherwise dispose of his property with the fraudulent intent to hinder or delay his creditors. On the 30th day of August, Cummings filed an additional affidavit setting up the further ground of attachment, that Homans had left the county of his residence to avoid the service of summons, and on the 10th of September still another affidavit was filed alleging that Homans *had* disposed of his property with the fraudulent intent to cheat, hinder and delay his creditors.

No defense was made to the action and judgment for the amount claimed was accordingly rendered. Homans, however, by the proper affidavit denied all three of the grounds of attachment and upon hearing the court discharged the order and from this judgment Cummings prosecutes this appeal. It appears that a short time before his failure Homans set apart certain notes to a ladies' sewing society which had a few hundred dollars deposited with him and that upon the day he suspended business he delivered to two certain banking houses in Cincinnati, securities sufficient to indemnify them on account of accommodations received from them on the day before. It is not pretended that the debts thus paid or secured did not in point of fact exist; nor

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that the securities were delivered by Homans to his creditors in pursuance of any fraudulent agreement or understanding with them, and as preferring one honest creditor to another has never been deemed a fraudulent disposition of property within the meaning of those provisions of the Civil Code of Practice, authorizing attachments upon such ground. This court is of opinion that the evidence does not sustain either the first or third ground relied upon.

The charge that Homans had left the county of his residence to avoid the service of summons was not sustained by proof of his absence from home at the time the officer called at his house, especially when it is considered that on the day after the institution of the action he was in Campbell county and the summons is executed.

Wherefore the judgment of the court below discharging the order of attachment is *affirmed*.

Hallam, for appellant.

Stevenson & Myers, for appellee.

BELL & MARLAY v. JAMES COCHAM.

Accounts and Accounting—Set-off and Counter-claim, by Reason of Defects—Waiver.

To a suit on account, and a set-off is filed, for defects, in the machinery bought, the fact that the defendant had ordered new parts for the machinery, to put it in perfect condition, is not a waiver of his original claim for defects, unless the quality and kind of parts ordered were furnished.

APPEAL FROM FLEMING CIRCUIT COURT.

September 29, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

It is contended for the appellants that if the mills were

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defective, as the evidence conduces to show, the appellee's letters of August 30th, 1867 and September 11th, 1867, bound him to pay the balance of the appellant's account of 1866, upon compliance with his request for new rollers and boxes, and that this was a new contract which waived objections to defects in the property as at first furnished. But admitting this and that new rollers and boxes were sent, the appellant in order to bind the appellee by his letters were bound to furnish the quality and kind of rollers and boxes that were ordered, or the furnishing of them did not waive the previous objections of the appellee. The proof conduces to the belief that the new articles furnished were as defective as those they were intended to replace, and that the appellee rejected them as he had a right to do.

The counter claim and partial failure of the original consideration, were therefore properly considered. And upon the evidence thus rightly heard, we think the judgment was as favorable to the plaintiffs as they had any right to expect.

Wherefore the judgment is *affirmed*.

Cord. for appellant.

Givens & Anderson, for appellee.

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HARRISON CASE v. LOUISVILLE & NASHVILLE RAILROAD CO. ET AL.

Abandonment—Work Incompleted.

Where an abandonment of a contract for work to be performed, is shown, if the owner suffers loss thereby, he is entitled to show same as a set-off to the claim of the creditors of the contractor, for the unpaid balance due.

APPEAL FROM MARION CIRCUIT COURT.

September 22, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

From the account current of the work and labor performed by

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Conehan for appellee, and the payments made for the same, it appears that when he abandoned the work of appellee, it owed him \$730, the injury and actual loss sustained on account of the abandonment of the work by Conehan greatly exceeded that amount; but it is insisted for appellant that he had a hard bargain. If that be so, there is neither allegation nor proof that he did not enter it freely and voluntarily. He might have discovered after making it that he would sustain even greater losses by pursuing further than he had done when he abandoned it and for that reason left. It is in evidence that appellee lost more by his failure to comply than the amount it owed him when he left. So that it cannot be a forfeiture in the proper sense; but it is remuneration in part for an actual loss for a breach of contract.

The case in *16 B. Mon.*, refererd to, is not analogous to this case. Here Conehan has received the price agreed upon for his work and labor except \$730; he fails to finish the work, and goes to parts unknown, and his employer does not refuse to pay him according to his contract, but claims damages for the breach of the contract on the part of Conehan to the amount it owes him. There is no controversy as to the amount earned under the contract but shall the defaulting contractor have it all and abandon the work and leave appellee to employ others to do what he had contracted to do, at an additional cost of more than twice the amount he owes. That does not seem equitable or just. Wherefore, we feel constrained to *affirm* the judgment.

Ro & Fo, Harrison, for appellant.

Noble, for appellee.

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MCLEOD & YOUNG v. ROLAND J. HARVEY.

Evidence—Proving Terms of Written Agreement—Bills and Notes.

It is not erroneous to allow the introduction of parol evidence to prove that notes given for an omnibus with which to operate a mail route, failed of consideration, in that the mail contract thus transferred was not renewed according to the contract.

Same.

It may be proved that the agreement itself constituted part of the consideration of the note contemporaneously executed.

APPEAL FROM BRACKEN CIRCUIT COURT.

September 15, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

This was an ordinary action founded on four promissory notes of the appellee, given originally for the aggregate sum of \$500—"for value received" as expressed in each of the notes.

The defendant by his answer sought to defeat the action, and to recover on a counter-claim against the plaintiffs, substantially on these grounds—that at the time of the execution of the notes the plaintiffs were mail contractors, and sold the defendant an omnibus used by them for carrying the mail and passengers over the mail route, and stipulated to pay him for conveying the mail for them and in fulfillment of their contract with the government, for an unexpired term of three years, and five months, the sum of three hundred and fifty dollars per year, payable quarter annually, and this employment and the omnibus, which was of but little value, formed together the consideration of the notes, and that after carrying the mail for about five months in compliance with his agreement, he was prevented from doing so any longer by the "failure of the plaintiffs to retain or secure the right of carrying the mail," consequently the omnibus became nearly useless, and an essential part of the consideration of the notes failed.

The material averments of the counter-claims being controverted by a reply in which the plaintiffs alleged that the omnibus

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was the sole and only consideration of the notes, a trial of the case on a submission of the law and facts to the court, resulted in a judgment for the defendant for \$66 from which this appeal is prosecuted.

It appearing on the trial that the value of the omnibus entered into the consideration of the notes the court, over the objections of the plaintiffs, allowed the defendant to prove that the omnibus was not worth four hundred dollars, nor more than one hundred dollars, for the apparent purpose of showing that notwithstanding the language of the agreement for carrying the mail, that contract, was a part of the action as represented by the notes and constituted a part of their consideration; and whether the court erred in this ruling is the principal question now presented for our decision.

We do not perceive anything in either the notes or the written agreement, for carrying the mail which ought to have required the rejection of the evidence. The fact thus sought to be established was not inconsistent with either of those written stipulations, and the agreement that a particular sum should be paid quarter-annually as for mail service did not exclude the right to prove that that agreement itself constituted part of the consideration of the note for \$500 contemporaneously executed. (*Gordon's heirs v. Gordon*, 1 Met, 285.)

We regard the evidence as competent and sufficient to sustain the conclusion of the circuit court.

Lindseys, for appellants.

Willis, Doniphan, for appellees.

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J. J. McHATTON, ET AL v. GEORGE I. FORD, ET AL.

Infants—Sale of Lands for Division.

A division of infants' lands, on a petition of the husband of one, and father of the other, as next friend, will be set aside, where an appointment of a guardian ad litem, is not served.

Petition—Pleading Must Confirm to Requirements of Code.

Where it is not shown in a petition by a father, as next friend, for a division of infants' lands, that he was a joint tenant, nor co-parcener with his children, nor that he holds the estate in trust for them, and their estate is different in timed duration, the court would have no jurisdiction, and the petition should be dismissed.

APPEAL FROM OWEN CIRCUIT COURT.

September 21, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

This proceeding to sell the reversionary interest of infants in town lots with improvements thereon in the town of Owenton, conforms neither to the requirements of *Chap. 85* of the *Revised Statutes*, nor to *Sec. 543* of the *Civil Code*.

Although there appears in the transcript a statement of two persons that a division of the lots mentioned would seriously impair the value of them that statement is not sworn to—the title papers under which the infants claim are not filed, the suit is brought in the name of the minors by the husband of the one and the father as their next friends; and while it appears that Mr. Lillard was appointed to take charge of the infants, but ignoring any authority to take care of their interests except inferentially, it does not appear that he was notified of the appointment, or that he acted in any way. The court, before ordering a sale of the property should have the title papers filed, so as to determine for itself the extent and character of the estate of the infants, how it was held, and had its value ascertained by its own commissioners so as to judge correctly as to the interest of the infants—But beside all this the section of the *Civil Code*, *supra*, does not embrace this case as stated in the petition—the

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father is neither a joint tenant, tenant in common, nor caparcner—their estates are different in timed duration—consequently the court had no jurisdiction of the case stated in the petition—Wherefore the judgment is *reversed* and the cause remanded with directions to dismiss the petition. The appellees are here resisting the reversal—and it appears that they appeared in the court below and resisted the motion to set aside the sale, they should therefore pay the costs in this court, but the dismissal in the court below should be without costs—the guardians *ad litem* paying plaintiffs' costs.

Craddock & Trabue, for appellants.

Drane, for appellees.

LEWIS MYRES & SLATER v. GEORGE W. SOWARDS.

Landlord and Tenant—Adverse Holding of Land by Tenant.

The relation of landlord and tenant, will not apply, where it is shown that no contract was entered into and no rents paid, no connection at all with the alleged landlord and then making a sale of title absolute.

Adverse Possession—Disputed Title by an Adverse Holding by Tenant.

One in possession, recognizing and acknowledging no landlord, paying no rent, and by deed disposing of his title, which was undisturbed on the records for 25 years, is held to acquire a good and perfect title by adverse holding.

APPEAL FROM PENDLETON CIRCUIT COURT.

September 24, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

In 1858, appellee sold by executory contract to appellant, Slater, a tract of two hundred acres of land in the county of Pendleton, for the price of \$2,000, one-fourth of which was paid down, and notes executed for the deferred payments.

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These notes being unpaid some time in 1865, the month not stated in the record, appellee instituted his suit in equity to subject the land to the payment of them.

About the time that appellee commenced his suit, Lewis Myres brought an action in the nature of ejectment to recover the land from Slater, it appears that these actions were consolidated, that of Myres having been transferred to the equity docket, and were heard together, Slater made his answer a cross petition against Myres and the appellee.

Myres claims that the land is covered by Moody's patent, bearing date in 1791, and that as early as 1824, he gave a lease of it to one Shelton Stewart, he claiming under Moody, and the land being unoccupied at the time Stewart entered under his lease and took possession, and that appellee and those under whom he claims bought Stewart's improvement and entered under his lease, and held in that way until shortly before he commenced his action when they first claimed to hold adversely to him.

Slater in his answer resists appellee's right to a judgment on the ground that he had no title to the land and seeks by his cross action to recover the part of the purchase money he had paid. Judgment was rendered for appellee by the court below and Slater and Myres have appealed.

It appears in evidence that about 1840, one Richard Mullins sold the land to John N. Dougherty, who entered upon it, but how he acquired the possession, whether from Mullins, or not, does not very satisfactorily appear from the evidence. But in 1846, Mullins and wife made an absolute conveyance of the land to Dougherty, and Dougherty and wife on the same day conveyed the same land to James Soward—both these deeds were made for valuable considerations and were in due time recorded in the office of the clerk of Pendleton county court, and the land has been held under Mullins since 1840, James Soward having devised it to appellee.

Myres does not connect himself with Moody, and no title is shown from the Commonwealth to Mullins.

No rule is better settled than that the tenant can not controvert the title of his landlord, while he continues in possession, and if Dougherty acquired possession from Stewart, and he was Myres' tenant, neither he nor those claiming under him could protect their possession by showing an adversary title paramount

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to Myres; and as a general rule the statute of limitations would not commence running so long as the relation of landlord and tenant existed between the parties, but whenever that relation was dissolved, and Myres had notice of it, it would commence to run because he would have an immediate right of entry—Dougherty purchased of Mullins in 1840, how Mullins originally entered does not appear, but he was claiming as his own and Dougherty entered in 1840 under his contract of purchase from Mullins of the absolute title—and then assumed a hostile attitude to Myres. In 1846, that purchase was consummated by an absolute conveyance to Dougherty, and on the same day Dougherty conveyed to James Sowards— It can not be presumed that Myres, if he claimed the land, could have been ignorant of the transactions in relation to this land. Mullins was not his tenant by contract with him, he sold the land to Dougherty who entered on it claiming as his own—having no connection with Myres, paying no rent, and acknowledging no landlord, it is scarcely possible that Myres could have been ignorant of all these transactions, and only wake up in August, 1865. Nineteen years nearly after Mullins conveyed it, and twenty-five years after he had sold it, then for the first time to dispute Mullins' right, and that, too, after appellee had commenced proceedings to enforce payment of his vendee of the price. Myres has shown no documentary title in himself, and the facts attending this transaction indicate very strongly that if Stewart in fact entered under him, that entry was abandoned, Mullins' claim understood, and recognized as paramount—and as more than twenty years had elapsed from Dougherty's entry for near nineteen years of which he had a deed, and from all the circumstances claimed adversely, of which Myres must have had notice—and therefore is barred—and as appellee made out a complete possessory title, appellant, Slater, should have accepted.

Wherefore the judgment is *affirmed*.

O'Hara, Drane, for appellants.

Perrin, for appellees.

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J. TAYLOR WILLIAMS *v.* WILLIAM MILLS & MULLINS.

Pleading—Petition Insufficient to Constitute a Cause of Action.

A petition, seeking to recover a consideration paid for a transfer of a claim to lands purchased at a decretal sale, to constitute a cause of action, must allege an undertaking or agreement to refund the money so paid on the failure of the court to confirm the sale, or any other contingency.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 14, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The only question in this case is, whether the petition states facts sufficient to constitute a cause of action?

The averments of the petition impart the payment of the sums of \$90 and \$110, in consideration of a sale and transfer by the defendant to the plaintiffs of some claim to land which he had purchased at a decretal sale, which sale was not thereafter confirmed, but vacated. This may all be true without any failure of the consideration of the payments, as the terms of the sale require of the defendant anything more than he did to entitle him to the money he received, and the petition alleges no undertaking to refund the money on the failure of the court to confirm the sale, or in any other contingency.

We are of the opinion therefore, that the petition is not sufficient to uphold the judgment, but time should be given to amend it on the return of the cause.

Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Hoge, for appellant.

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THOMAS DUGAN v. JOHN W. GAUMAN'S ADMR.

Vendor and Purchaser—Rescission of Contract—Failure to Have Sale Confirmed.

Gauman purchased property at a judicial sale, subject to confirmation, and sold the land to Dugan, who sold to King for \$250 profit. Gauman's sale was not confirmed, but a resale ordered. Gauman died, and Dugan bought at the second sale for \$2,600. In a suit to recover his loss from Gauman's estate, held, that as he had not made actual payment on the first purchase, he could not recover damages.

APPEAL FROM GREENUP CIRCUIT COURT.

September 23, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

John W. Gauman, being the accepted bidder at a decretal sale of 33½ acres of land, which remained to be confirmed, and the price to be paid, sold and undertook to convey it to the appellant, Thomas Dugan, for \$2,000, no part of which was paid, though the appellant took possession of the land under his purchase, and subsequently sold the land to B. F. King for \$2250, which King paid him.

Gauman, in the meantime, died, and his purchase not having been confirmed, was set aside, and a sale ordered, at which Dugan, in order to obtain the title for King, became the purchaser of the land for \$2600, of which, under an agreement between him and King, the latter paid \$100 and Dugan \$2500.

This suit was brought by Dugan to recover of Gauman's estate the amount of the difference between the price which Dugan agreed to pay Gauman and that at which he subsequently purchased. The law and facts being submitted to the court, the petition was dismissed, and Dugan has appealed from that judgment.

The principle is well settled that where there is an inability to convey, without fraud, or where there has been an eviction of a vendee the value of the land *to be ascertained by the price paid* is the measure of damages. If the appellant had paid to Gauman the price he agreed to pay him, he would on the failure

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of Gauman to acquire and convey the title, have been entitled to recover back the amount of the purchase price paid, but having paid nothing, the court below rightly adjudged that he was entitled to no recovery, although in consequence of what seems to have been intended as a speculation, he appears by the subsequent transaction to have lost \$250, instead of making that sum.

Wherefore, the judgment is *affirmed*.

Dulen, for appellant.

Ireland, for appellee.

WILLIAM M. JENKINS v. ROBERT BATES, ET AL.

Pleading—Petition for Tort—Necessary Allegations—Demurrer.

A petition for aiding and abetting in tortiously taking property, without a description of the property taken, is demurrable.

Same—Answer Filed, and Depositions Taken.

After an answer has been filed and depositions taken, it is error to permit a withdrawal of the answer and a demurrer filed.

APPEAL FROM LETCHER CIRCUIT COURT.

September 27, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The defect in the original petition was in charging the appellees, as *aiders* and *abettors* of a confederate officer in tortiously taking his property, without any description of the property which might so far identify it as to bar another action for the same trespass. On that technical ground a demurrer to the petition, in the first instance, might have been sustained. But instead of demurring the appellees filed an answer waiving that objection and traversing all the material allegations. On the issue thus joined the appellant took depositions as required,

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proving that the appellees themselves took his property, and identifying it by a general and sufficient description. After all this the circuit court erred in permitting the appellees to withdraw their answer and file a demurrer to the petition, and also in thereupon sustaining the demurrer. And, after the appellant had amended the petition by charging the appellees with being the principal trespassers and *converting* the property to their own use, the circuit court ought not to have rejected it and dismissed the petition.

Wherefore the judgment is reversed and the cause remanded for amended pleadings and further proceedings.

Lilly, for appellant.

Rodman, for appellees.

ERWIN ZEYSING v. JOHN H. WOLFE.**Vendor and Purchaser—Parol Sale of Lands.**

A parol sale of land, must be supported by uncontradicted evidence of an absolute barter, to overcome the statute of frauds.

APPEAL FROM SCOTT CIRCUIT COURT.

September 13, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Appellant brought this action to recover a house and lot in Georgetown, of the appellee.

That he was once the owner of the property and held the legal title to it when he brought his action, is not controverted in the answer, but appellee claims to have purchased it from him at the price of \$1500, and to have paid him for it; holding the affirmative of the issue, it devolved on appellee to make out his alleged contract of purchase by proof.

He produced no written evidence of any contract for the alleged

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sale, nor does he assert that any writing to that effect ever existed, and the only evidence he has offered to sustain his claim, is the testimony of two witnesses. First that of Edmund Jones as to his recollection of a conversation he had with appellant in the summer of 1847, on the subject of the sale of the property to appellee. The substance of which is that as appellant was driving some sheep home from one, Heidleburg's he called at the house of witness and he asked him what he had done with Henry, meaning appellee, and that he said to him he ought to give him his old stand, when appellant remarked to him, that Henry was doing better than he was, that he had sold him the property and Henry had nearly paid him for it, that he was making it easy with him by taking things from him that he was bringing on and allowing him a profit on them. And although he stated that he never forgot business transactions, nor any thing he had been told of, he could not remember what appellee was to pay for the property, and the nearest he could come to it, was that it was not less than one thousand, nor more than fifteen hundred dollars.

And second, of Charles A. Douglass, who states that in 1847 or 1848, when a stable was burned back of the shop lot adjoining his father's dwelling, after the fire was over, appellant remarked, in the presence of himself and three others, all of whom are dead, but himself, that he did not care much about the burning, that he had sold the house he owned to appellee, and did not own any property in Georgetown then.

Besides the questionable character of the witness Jones, his statements are in conflict with the history of the purchase given by appellee himself. He says he made it in the latter part of the year 1847, and was by the terms of the contract, to pay the money at such times and in such sums as his means and circumstances might enable him to do; and that he continued to make payments according to said contract up to 1852, in which year he completed the payment of the entire price. If the purchase was made the later part of the year, it must have been after the time when Jones says he had the conversation, Jones says the payments were made in goods, and appellee says it was in such *sums* as he was able to pay and of course it was in money. But Mersher proves that he and one of the sons of appellant brought the sheep from Heidleburg's. And no witness

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proves the admission by appellant of the payment of any part of the purchase money, but Jones, and there is no direct evidence of any payment having been made. Douglass only heard him say he had sold the property, but heard nothing said about any payments having been made. So that even if the parol contract for the sale be regarded as made out by the evidence, all that is said about the payment of the price is vague, uncertain and wholly unreliable. But the statements and conduct of appellee in relation to the property, as proved by appellant, are inconsistent with the existence of a purchase by appellee, and repel any such conclusion. And when that evidence is considered in connection with other facts, such as that appellant continued after 1847, regularly to list the property for taxation with the county and town assessor, and to pay the taxes for the same—neither of which appellee ever did—and the receipts filed with the deposition of Samuel Cody, former marshal of Georgetown, executed by him to appellant for the years 1856 and 1857, for his town taxes for these years, the one for 1856 showing on its face and reciting that the money was paid by the hands of appellee. Appellant claimed no other property in the town but that now in dispute, appellee knew it, paid no tax on it himself, and after having taken the receipt, doubtless handed it to appellant without questioning his right to the property, and this four years after he claims to have paid him all the purchase money. Nor does this record furnish any evidence that appellee ever claimed the property as his own, or to hold it adverse to appellant, until about the time the notice to quit was executed on him, certainly there is no evidence that appellant was apprised of such a holding.

If such evidence as is relied upon in this case, repelled as it is by strong presumptions, if the frail memories of one or two witnesses of fugitive remarks in an accidental conversation, detailed twenty years after they are uttered, shall be adjudged sufficient to overturn legal titles and change estates, the statute against frauds and perjuries is a vain enactment, affording no protection to owners of real estate, and the laws for the regulation of conveyance and the preservation of titles, useless encumbrances on the statute books.

The evidence, in our judgment, is insufficient to sustain the claim of appellee to the house and lot sued for, consequently we

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do not concur in the conclusion to which the circuit judge arrived.

Wherefore the judgment is reversed and the cause is remanded with directions to render judgment in favor of appellant against appellee for the purchase, in the petition described. And as it is apparent from the evidence that the rents would be quite sufficient to off-set any ameliorations to the property made by appellee, even if they were such as he has shown himself entitled to pay for, no account of improvements and rents need be taken, but appellant will be entitled to rent from the date of his notice to quit—and for further proceedings consistent herewith.

Prewitt, for appellant.

Polk, Duvall, for appellee.

LACKEY SALISBERRY v. JOB MARTIN.

Ejectment—Instructions—Question of Law Submitted to the Jury.

An instruction "that if the jury believed from the evidence, that at the date of the action begun, the plaintiff was the owner of the land in controversy," is erroneous in that a question of law, as to the ownership of the land was submitted.

Same.

They should have been instructed that if from the evidence certain facts existed (enumerating them) they should find for the plaintiff.

APPEAL FROM FLOYD CIRCUIT COURT.

September 26, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

This is an action in the nature of an ejectment for land conveyed by the coroner of Floyd county to the plaintiff, as purchaser thereof, under several writs of *fi fa* which had been issued against the defendant and others, who refused to surrender possession, and still resists an eviction.

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A verdict and judgment having been rendered against appellant, he has appealed to this court, and insists on a reversal on two principal grounds.

First. That more land was sold under the executions than was necessary to make the amount shown to be due to the creditors by the executions, and, 2nd; error in the instructions.

By the execution in favor of Lacky, as appears from an abstract taken from the execution book and used as evidence on the trial, the debt was \$156.45, interest from the 7th of January, 1859 till paid, and \$1 costs, which seems with his commission, and fee for his levy it was the duty of the officer by the command of the writ to make, and it appears by the return of the officer that he sold the land in controversy on the 10th of October, 1859, and sold enough to produce on that writ, \$195.63.

To debt of \$156.45 add costs, \$1, making.....	\$157.45
Interest to the 10th Oct., nine months and three	
days	7.16
Sheriff's commission	8.23
For levy, &c.50
Making in all this sum	\$173.34

But the clerk's abstract shows that the officer makes by a sale of the land, \$22.29 in excess of the sum required to be made. Without having entire confidence in our arithmetic, the foregoing seems to us correct, and if it be so, the officer exceeded his authority and as has been repeatedly held, it would vitiate and set aside the sale. But as the judgment must be reversed on another ground, that question can be more accurately tested on a subsequent trial.

By instruction No. 1, the jury were told by the court, that if they believed from the evidence that at the date of the institution of the suit the plaintiff was the "owner" of the land described in the petition, and the defendants, or either of them, were in the possession of any part of said land, such possession was wrongful, and the jury will find for the plaintiff against such, defendant, or defendants. Whether the plaintiff was the *owner* of the land was a question of law for the court to decide, and should not have been submitted to the jury, as was done by the instruction, but they should have been told if they believed from the evidence that certain facts existed, which should have been enumerated, they would find for the plaintiff.

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The third instruction is obnoxious to a like objection; in it the jury are made judge of whether the land is the property of plaintiff and whether the defendants are in the wrongful possession of it, instead of being the tryers of certain facts which the court should have told them if they found from the evidence to exist, would entitle the plaintiff to recover damages.

For the foregoing errors the judgment is reversed, and the cause is remanded for a new trial and for further proceedings consistent herewith.

John Harkins, for appellant.

James for appellee.

SAVINGS INSTITUTION OF HARRODSBURG v. E. HUTCHISON & Co.

Pleading—Petition on Contract Between Banks.

A petition on a contract, must show each specific item on which an alleged loss is claimed, and not a mere allegation in general as to a total loss.

Same—Account Filed With the Pleadings.

An account referred to in a petition and styled by "Exhibit ——" in which different items, constituting different transactions are set down, to constitute a part thereof, the items alleged to constitute the obligation must be shown in the petition, at least in subsance. And if a written contract, must be filed, or its loss accounted for.

Same.

So much of every contract or transaction must be stated in the pleadings as to show how the plaintiff is entitled to the relief he seeks.

APPEAL FROM MERCER CIRCUIT COURT.

September 14, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

By an act of the legislature, approved March 7, 1850, entitled

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“An act to incorporate the Elizabethtown Savings Institution, and for Other Purposes, Sess. Acts, 1849-50, pp. 617-624,” The Harrodsburg Savings Institution was incorporated, and a majority of the persons named in the act as commissioners were to open books for the subscription of stock in said institution, and all the provisions of an act incorporating the Elizabethtown Institution were made applicable to the Harrodsburg Savings Institution, except that the shares of stock in the latter were to consist of twenty-five dollars each, instead of fifty, and were payable in installments of two dollars and fifty cents, when the subscriptions of stock were made, and two dollars and fifty cents monthly thereafter until the whole was paid in.

By the act of incorporation the capital stock was fixed at \$50,000, with the power to increase it to \$100,000, independent of the stock deposited. And after the smaller amount was subscribed, the stockholders were to proceed to the election, from amongst themselves, of five directors under the superintendence of at least three of the commissioners named to open books for subscriptions, and the directors were then to elect a president, and treasurer, and such other officers as they should deem necessary to conduct the affairs of the institution, and take bonds from them in sufficient penalties to secure the performance of their duties.

The business of the institution was to receive bank bills and other valuables on deposit, deal in gold, and silver coin, bullion, bills of exchange and promissory notes.

It does not appear from the pleadings, nor evidence, at what precise time it went into operation, but before the 3d of June, 1865, we may assume that the minimum amount of capital stock had been subscribed, and paid in, and the institution had been properly organized, and was transacting business, as on the last named day an act of the legislature was passed to authorize the president and directors to wind up and settle its affairs on equitable principles. Provided that the stockholders, representing a majority of the stock, consented thereto at a meeting of the stockholders in Harrodsburg, to be called by the president, directors, & Co., after twenty days notice shall have been given in the manner prescribed by the act. *2 Vol., Sess. Acts, 1865, p. 631.*

This action was brought by appellees, against said Institution, on the 11th of June, 1868, to recover from it the sum of forty-

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nine thousand nine hundred and eighty-six 43-100 dollars, money advanced by appellees, as they allege, in paying off depositors of appellant, more than the property and effects of the latter transferred to the former amounted to, and for losses sustained on the sales of real estate and interest, and the court below having rendered judgment against appellant for nearly the sum claimed, it has appealed to this court.

The cause of action as stated in the petition grows out of an alleged contract made on the 9th of April, 1867, by appellees, with appellant, to the following effect:

A. G. Kyle, R. M. Davis, and B. B. Campbell, making a board of directors of the Savings Institution, hereby offer the deposits of their institution, upon condition that the banking firm of E. Hutchison & Co. pay the depositors as fast as called for. The directors of the firm of E. Hutchison & Co. agree to become responsible for all the deposits, and in consideration thereof, the directors of the Savings Institution agree to give to the firm of E. Hutchison & Co. a lien on the land and property of the Savings Institution, and also bills enough so fast as they may be received to secure them; the firm of E. Hutchison & Co. agree to take the banking house vault, furniture and fixtures, etc., belonging to the Savings Institution, at the price of nine thousand dollars, which are to go towards paying the depositors, the cash on hand to be counted, and passed over to the firm of E. Hutchison & Co.; this writing entered on a book called a minute book, used by both institutions, appears to have been signed by A. G. Kyle, president of the Savings Institution, and attested by Cardwell the cashier.

On the 31st of July, 1867, as explanatory of the agreement just referred to, as is averred in the petition, a second writing was executed by E. Hutchison & Co. and the Savings Institution, which, after referring to the agreement of the 9th of April, 1867, recites, that E. Hutchison & Co. thereby agreed to pay off the depositors of the Savings Institution, whose claims were at the time estimated at ninety-two thousand dollars, from a statement furnished by J. W. Cardwell, then the cashier of said institution, in consideration that it would convey certain real estate, estimated at *thirty-nine thousand and seventy dollars*, and certain other property, and transfer bills as fast as they matured sufficient to secure E. Hutchison & Co. That the deposits in the Savings

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Institution amounted \$140,000, instead of \$92,000, of which fact both parties to the first contract, at the time, were ignorant.

That E. Hutchison & Co. had paid for said Savings Institution eighty-three thousand one hundred and fifty-seven 74-100 dollars, and it had conveyed to E. Hutchison & Co. the lands in the original contract mentioned, the banking house and appurtenances, belonging thereto, at \$9,000, and bills discounted amounting to \$18,823.97, and cash \$13,894.92, and concludes with the statement, that to prevent any misunderstanding, and to carry out the original contract between the parties, it was then agreed that E. Hutchison & Co. were not bound to pay the deposits with, and other liabilities of the Savings Institution, further than it furnished assets, with which to pay the same. This agreement was signed by A. G. Kyle, president, and Davis and Campbell, two of the directors of the Savings Institution, to bind the corporation, and not to impose a personal liability on the stockholders, as is stated at the close of the instrument, and the same, after their express approval, was signed by Hutchison & Co.

After reciting these alleged contracts, the original petition concludes as follows:

“Plaintiffs state that the *defendant*, the Savings Institution of Harrodsburg, is indebted to them for money paid to the depositors of said Savings Institution, under and by reason of said contract, and for money paid for defendants in the sum of forty-nine thousand, nine hundred and eighty-six 43-100 dollars, after allowing all the credits to which the defendant is entitled, as will more fully appear by an account herewith filed, and made part hereof, marked ‘Y.’ No part of said sum has ever been paid. Wherefore, plaintiffs pray,” etc.

Whether the allegations of the original petition, taking the contracts as recited therein, and the exhibit “Y” referred to, as parts thereof, authorized the judgment, is the first question we proceed to dispose of.

According to the statement in the contract of July, 1867, the indebtedness of appellant was estimated at \$92,000, when, as the parties had subsequently ascertained, the deposits with appellant then amounted to \$140,000, but appellees had then only paid out for appellant \$83,157.74-100, and it had conveyed the land in the original contract mentioned, which was at \$39,400. The banking

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house and fixtures at \$9,000, bills discounted \$18,823.97-100 and cash on hand \$13,894.92-100, aggregating the sum of \$81,188.89-100, leaving a balance of payments, by appellees, over receipts, of \$1,968.85-100, with the obligation of appellant that they should only pay its liabilities as it furnished the means for making payments. And there is no averment that appellees had paid or were bound to pay any more than said sum of \$83,157.74-100, nor that appellant was bound to account for losses on the sales of real estate. It is manifest therefore that the judgment for the whole amount adjudged against appellant was not authorized by any averments in the original petition.

In an amended petition appellees allege that after making the contract of the 9th of April, 1867, relying upon the truth of the representations made by the defendant through its officers in regard to the amount of the deposits, and before the discovery of the falsehood of said representations, they rendered themselves liable to pay the depositors a much larger sum than the amount of assets furnished by defendant to pay the same, the excess being \$49,986.43. That they credited defendant's depositors by the balance it owed them, on their books, and charged themselves on the pass-books of the several depositors with the amounts due to each. Whereby defendant's liability to them was fully discharged, and their responsibility fixed, and that they were made liable to said depositors, by the contract with appellant of the 9th of April, 1867, and from which they were not discharged by the one of the 31st of July, 1867, and could not be, without the concurrence of the said depositors. That their liability having been fixed by the first named contract, appellant executed the last contract to bind it for any excess over and above its assets that appellees should be required to pay, and they pray for judgment for said excess of \$49,986.43, and pray alternatively to be substituted to the rights of the depositors, whom they have paid.

In the second petition appellees allege that appellant is indebted to them in the sum of \$32,000 for money deposited by them with it—for money loaned, and for money paid out at its special instance and request. No part of which has been paid to them, although they had often demanded the same. They then repeat the charge of indebtedness of appellant as shown by the account filed of \$49,986.43, and conclude with a prayer for a judgment for said sum.

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As the sufficiency of the original petition, and amendments, to authorize the judgment rendered, is called in question, it was deemed proper to state the substance of them in this opinion, in order that the questions arising on them and their determination might be the better observed and understood.

Two contracts are stated in the petition as the foundation of the action; the one of the later date is referred to as explanatory of the first, and they are filed as parts of the petition. And account marked "Y" is also filed as a part of the petition as showing the items constituting the indebtedness of appellant to appellees.

Two items on that account and which constitute, in part, the alleged indebtedness, are charged as follows:

"To loss on Negly farm\$1934

To loss on Allen house 1600

\$3534"

Appellees pleadings contain no allegation that any contract ever existed between them and appellant in relation to the Negly farm and the Allen house, or either of them, and they wholly fail to allege any acts, or omissions, on the part of appellant in relation to said property, which entitled them to an action, or to any relief whatever, in connection with said property.

If the "Negly farm" and "Allen house" had been sold by appellant to appellees, and there was an agreement by which the latter was to refund to the former any loss they might sustain in the sale of them, and that agreement was reduced to writing, by section 145 Civ. Code, the writing should have been filed with the petition, or its absence accounted for, and even if the contract had been in writing, and it had been filed, it would have been necessary for appellees to have stated in their petition the contract in terms, or at least in substance, and then to have stated facts showing, either by the acts or omissions of appellant, they were entitled to an action, or to relief against it. And if such allegations and statements are necessary, where there is a written contract between the parties, and that filed, it is even more important that they should be made where there is not writing. *Hill* for use of *Wintersmith v. Barrett, &c.*, 14 B. M., 83; *Collins v. Blackburn, Ib.*, 254; *Riggs, &c. v. Maltby, &c.*, 2 Met., 88.

In this case there is not an allegation in the pleading to be

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found of an act, or an omission, for which appellant should be charged on account of the sale of the Negly farm and Allen house, and it was erroneous to render judgment for any loss on said farm and house.

It may be further observed, that there are other items in appellees' account which should not have been allowed without specific and direct statements of facts in the petition sufficient to constitute a contract, express or implied, and upon which an indebtedness must be shown. For example, the first charge on the account of appellees is as follows: "1867, April 20. To cash paid in by stockholders *E. H. & Co.* and placed to *Cr. E. H. & Co* on Savings *B. K. Books* as deposit \$29,250.00." Admitting that courts may understand the artistic mode of keeping accounts, by *Capitals* or initials, or even in hieroglyphics, still it is not readily perceived how appellant under the contracts set out in the petition can be made responsible upon a mere entry of that character without a statement of facts to show how its liability arose. If *E. H. & Co.* means *E. Hutchison & Co.*, then it appears that some of the persons who composed the firm of *E. Hutchison & Co.* were stockholders in the *Savings Institution*, and it may be that the money paid in by the members of said firm was the money due from them on their stock in said Savings Institution. If, again, *Savings "B. K. Books"* means the books of the Savings Institution, which may be inferred, but which is scarcely allowable, as we have failed to observe in any other part of the record that appellant was ever styled "*Savings B. K.*" Other items might be referred to on the account, which are not embraced in the scope and meaning of the contracts set out as the foundation of the action, and which were allowed in making out the indebtedness of appellant, without sufficient allegation, but a particular reference to all of them would extend this opinion to an unreasonable length—now already too long. And we therefore close this branch of the case with the remark, that so much of every contract or transaction should be stated in the pleadings as to show how appellees are entitled to the relief they seek.

The alleged contracts made by appellant with appellees are not the mode contemplated by the act *supra* for settling and winding up the affairs of appellant, but as the stockholders representing a majority of stock in the institution seem to have entered into, and approved, said contracts, and as irreparable

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injury might result from setting aside said contracts, it seems to be to the benefit of all parties interested that the accounts between the parties should be now settled and closed up according to the spirit and meaning of said contracts, and on equitable principles.

Wherefore, the judgment is reversed, for the reasons herein stated, and the cause is remanded, with directions that appellees have permission to amend their petition, and for further proceedings consistent herewith.

Klye, James, Durham & Jacobs, for appellant.

Hardin, for appellees.

JOHN SEHON, JR., ET AL V. GEORGE T. EDWARDS.

Pleading—Sufficiency of Answer—Demurrer.

An answer alleging a deed made, and notes taken for the purpose of obtaining money by ostensibly discounting them, at a usurious rate for the money advanced, is demurrable.

Same—Usury.

This would be equivalent to a direct lending of money for usurious interest.

APPEAL FROM JEFFERSON CIRCUIT COURT. CHY. DIV.

September 7, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The allegations of the answer of the appellant, Sehon, confessed by the demurrer, sufficiently import that the deed was made by McCarthy and wife and the notes of Sehon taken in pursuance of an arrangement, of which the appellee was cognizant, for the purpose of obtaining money from him by ostensibly sharing or discounting the notes to him, at an usurious rate of interest for the use of the money advanced. This, if true, as alleged

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in the answer, was, in our opinion, according to the case of *Richardson v. Scobee*, 10 B. Monroe, 12, and other decisions of this court, equivalent to a direct lending of money for usurious interest, and the court therefore erred in sustaining the demurrer of the plaintiff to the answer.

Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Brown, for appellant.

Cochran, for appellee.

J. M. DAVIS & Co. v. A. J. RICE & Co. ET AL.**Lien—Contracts—Rights of Seller of Goods.**

A lien is a right to retain property until some charge upon it is paid: and may be legal or equitable. The sellers lien upon goods for their price, is a legal lien and is founded on possession.

Lien of Creditor on Goods in Transitu.

A sale of goods, made on the express condition that they were to be paid for on delivery, held, to create a lien in the creditor, to the exclusion of other creditors, where the goods were temporarily stopped in transitu and attached.

Same.

If the terms allowed for payment for goods, elapse before delivery, the sellers right of lien revives. So if the buyer becomes insolvent before actual delivery, the seller regains his lien.

APPEAL FROM MCCRACKEN CIRCUIT COURT.

November 3, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

In May, 1867, A. J. Rice & Co., a firm of merchants doing business in *Florence, Ala.*, sent their written request or order to J. M. Davis & Co., wholesale grocers in Louisville, Ky., to send them two sacks of good Rio coffee, two barrels good brown

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sugar and two boxes of starch, through their agents, to be paid for on delivery.

The articles were shipped on the 8th of June by Davis & Co., on the steamer *Cora S.* in good order, to be delivered to consignees in like good order and condition, with privilege of storage, reshipping, and lighterage over shoals, etc., and the price for transportation fixed, all of which is shown by the bill of lading given to Davis & Co.

These goods were landed temporarily at Paducah, to be there re-shipped to their destination, and before Rice & Co. had become possessed of them, and while at Paducah, they were attached by the Kanawha Salt Company for a debt, alleged by said company to be owing to it by Rice & Co.

Davis & Co. filed their petition alleging the foregoing facts, and also that the goods were theirs, that they never had parted with the possession of them, that Rice & Co. had not paid for them, and the goods were not to be delivered until paid for, claiming that they had a seller's lien on them, or if they had a right to stop them *in transitu*, Rice & Co. being insolvent, or greatly embarrassed.

The suits of J. M. Davis & Co. and of the Kanawha Salt Co. against Rice & Co. were consolidated and heard together.

On final hearing, the attachment of Davis & Co. was discharged, and their petition dismissed, the attachment of the Kanawha Salt Co. sustained, and the goods adjudged to be sold to satisfy their claim, and Davis & Co. have appealed.

In Story on Contracts, section 795, it is said: A lien is a right to retain property until some charge upon it is paid; and may be legal or equitable. The seller's lien upon goods for their price, is a legal lien and is founded on possession.

So soon therefore, as the seller relinquishes the possession of the property, he loses his right of lien. Herein the seller's right of detaining the goods differs from his subsequent right to stopping them *in transitu*, for the latter right exists until they shall have arrived at their place of destination, and been transferred to the actual possession of the buyer. Possession is the test of a right of lien. Non-delivery to the vendee is the test of a right of stoppage *in transitu*.

Sec. 796. The payment of the price is a condition precedent implied in a contract of sale, without which the vendee can

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neither take the goods, nor sue for them, unless a future day of payment be fixed in the contract, in which case, he waives his lien and the purchaser may take the goods when he pleases. The seller however, has a remedy by action against the buyer in default of payment at the stipulated time.

But if the term allowed for payment elapse before delivery, the seller's right of lien revives. So if the buyer become insolvent before actual delivery, the seller regains his lien.

In this case the sale was made on the express condition that the goods were to be paid for upon their delivery, they were in the possession of appellants when the attachment of appellees' was levied on them, as the evidence shows, and consequently their lien for the price had not been waived, and it was superior to any appellees acquired by their attachment, and the court below erred in dismissing their petition and discharging their attachment.

According to the evidence, the solvency of Rice & Co. was at least questionable. But appellants' right to stop the goods *in transitu* need not be considered, as their lien as vendees is clearly established.

Wherefore the judgment is reversed, and the cause is remanded with directions to render judgment to enforce the lien of appellants on the goods described, and for further proceedings in accordance with this opinion.

King, Bramblette, for appellants.

W. G. Bullitt, for appellees.

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LOUISA FIELD v. WILLIS FIELD'S ADMR., ET AL.

Husband and Wife—Land Purchased by Husband Paid by Wife's Inheritances.

Where it is shown that lands purchased by a husband, no conveyance having been made him, were settled by his purchase money bonds being discharged by the wife relinquishing her interest in her father's estate, held, between her and her husband's creditors, that the lands belonged to the wife.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 2, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Willis Field died intestate at his residence in Daviess county, and his administrator filed a petition in equity against his widow heirs and creditors, alleging that he was the owner of considerable personal estate, and several tracts of valuable land, all of which would be required to pay his debts, and that the estate was insolvent. By an amended petition it is alleged that intestate died possessed of several tracts of land. One containing 194 acres conveyed by R. W. McFarland, the father of Mrs. Louisa B. Field, to herself and husband, the said intestate, jointly; a tract of 113 1-4 acres conveyed to him by Benj. Field; also a tract of 110 acres purchased by intestate in his life time from Griffith and Triplett, executors; the purchase money for which had all been paid, but no conveyance had been made; and that he owned a tract of 343 acres purchased at the sale of the real estate of R. W. McFarland, deceased, under a "decree" of the Daviess Circuit Court, rendered in the suit of William Moore, Guardian v. Willis Field, and others, and it is alleged that although the steps in said case were regular, and the intestate had paid the purchase money, *the sale had never been confirmed*, and no conveyance had been made to him for the land, and the title was still in the heirs of said McFarland, one of whom was Louisa B. Field, widow of intestate, the other heirs being Mrs. M. Hill, wife of A. D. Hill, and the children of two of his children who were dead. The tract of 343 acres is claimed by

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Mrs. Field, the widow, who in her answer alleges that it constituted a part of the real estate owned by her father at his death, and was not equal in value to her portion of his real estate descended to her, and that although her husband was the nominal purchaser of said tract at the sale of the real estate of her father, still he never paid of his own means one cent for it, but his bonds for the purchase money were satisfied by crediting them with so much of the amount due her for her part of the real estate descended to her from her father.

The court below adjudged that said 343 acre tract was a part of the real estate of Willis Field, deceased, and ordered a sale of the same, after ordering dower to be allotted to the widow out of the same, and from that judgment she has appealed.

From a statement of facts agreed in the case by the parties, a petition was filed by Moore, guardian, v. McFarland's Heirs, for a sale of his lands, that the land in controversy was purchased by Willis Field, husband of appellant, and paid for by charging the price to her as one of the heirs of R. W. McFarland, deceased. That no conveyance was ever made to Willis Field during his life, or to his heirs since his death, nor was a conveyance ever ordered.

From the very imperfect transcripts filed as part of this record it seems that there were two petitions filed at different times for the sale of the lands of R. W. McFarland, deceased; one in the name of William Moore, guardian, and others, against R. W. McFarland's Heirs; to this petition the name of Willis Field is signed as plaintiff, and his wife filed her answer, in which she consents to a sale of the real estate of her father, but prays that the proceeds be paid to the distributees of her father; the record does not show, however, that she made the same under privy examination, nor that it was ever sworn to by her; it is probable that the two actions were consolidated, but it does not appear that the sale to Field was ever even confirmed.

Mrs. Field alleges in her answer that her husband purchased the land for her, and for that reason the bonds executed by him for its price were discharged by the money coming to her, and it was a proper investment for her, and such as the court should have made, and would approve; and the evidence authorizes the conclusion that the purchase was made for her, as the sale was made in 1857, and no conveyance was ever applied for or made to her husband, although he did not die till 1863.

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But by *section 4, Article 6, Chapter 86, 2 R. S., page 311*, it is provided that the court ordering a sale of a married woman's lands and slaves, shall cause the proceeds of the same to be reinvested in lands or slaves in or out of this State, subject to the same uses, limitations and trusts as the land or slaves sold were held; and section 5 provides: The descent or distribution of the proceeds, or of the property in which the proceeds of land or slaves sold under any decree of court, is invested, shall not be changed from what would have been the course and descent, or distribution, if no sale had been declared or made.

This court has repeatedly held that before a sale made by a commissioner has been confirmed, the chancellor has complete control over it, and until it is approved it amounts to nothing more than a proposition to purchase, which the court may accept or reject at its discretion, so that if this sale, was never confirmed, the chancellor might do so, and require the money to be reinvested in real estate; or even if it had been approved, and no conveyance made, before he would order a conveyance, he would see that the money was reinvested as provided for in sections 4 and 5 *supra*.

In this case, as the bonds for the purchase money were satisfied by Mrs. Field's portion of the estate coming to her as heir to her father—and no provision was made for her, as she has elected to take the land, she has a clear right under the statute to have it. Her money paid for it, and she has a clear equitable right to it, independent of any statute.

Wherefore, the judgment is reversed, and the cause remanded, with directions that a commissioner be appointed to convey said tract of 343 acres to her on the part of R. W. McFarland's heirs. As to the other tracts conveyed to herself and husband, and which she is entitled to by survivorship, no question is made in reference to it.

Harlan & Newman, Haynes & Little, for appellant.

Sweeney & S., Ray & H., for appellees.

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G. W. HERD, .ET AL v. CLAY COUNTY COURT.

Sheriffs and Constables—Liability of Surety—Acceptance of List of Tax-Payers—Waiver.

The acceptance of the list of tax-payers, by the sheriff, though not delivered in ten days after execution of his bond, held, to be a waiver of the time of delivery.

Pleading—Action Against Sureties of Sheriff for Settlement.

Where a petition alleges the list of persons chargeable with the payment of the county levy, was placed in a sheriff's hands, this can only be negatived by way of defense to the action. It is presumed the clerk did his duty.

Same.

It was not necessary to allege in so many words that the levies were distrainable, nor that the sheriff had collected them.

APPEAL FROM CLAY CIRCUIT COURT.

September 29, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought by the Clay County Court against Herd the sheriff, and collector of the county levies for said county for the year 1857, and his sureties, for failing to settle his accounts, and to pay over the money in his hands belonging to the county.

In the court below no defense was made to the action. A reference was made to a commissioner to ascertain the amount in the hands of the collector and to report the same to the court. He reports the amount found due after deducting the list of delinquents, and the collector's commissions; his report was confirmed, and judgment rendered accordingly—from which the defendants below have appealed; and it is insisted, first, that the petition is fatally defective in not alleging that the clerk of the county court did within ten days after the sheriff as collector had executed the bond required by law deliver to him a list of the persons chargeable with the payment of the county levy. It is alleged that the list of all persons chargeable with the payment of county levy for Clay county for the year 1857 was placed in the said sheriff's hands, giving the number and amount with

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which he was charged, and of course the sheriff received said list. The legal presumption is that the clerk did his duty, and if he did not, it should have been negatived by way of defense. And, besides, the acceptance of the list was a waiver of the time of the delivery, even if they were not delivered in ten days after the execution of the bond.

Nor was it necessary to allege in so many words that the levies were distrainable, nor that he had collected them. All the facts are alleged to show that they were distrainable which is more certain in pleading than to state conclusions. And that being the case it was the duty of the sheriff to collect the levies and pay them over, and for such as could not be collected, present his list of delinquents.

The time when the commissioner was appointed by the county court to settle with the sheriff was not material; it is alleged that a commissioner was appointed to settle with the sheriff for the county levy for the year 1857, and he often called on him to make said settlement but he had failed to make said settlement, and also had failed and refused to pay the residue of the levies to the county treasurer for the year 1857, after deducting the amount due to the county creditors.

The commissioner states in his report that he notified appellant of the time and place of his sitting.

Perceiving, therefore, no available error for reversal, the judgment must be *affirmed*.

Turner, for appellants.

James, for appellee.

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E. F. HUMPHREY v. E. HOBBS.**Pleading—Sufficiency of Petition on an Account.**

A petition alleges Plaintiff sold to Sheppard a barrel of whiskey, 42 gallons, for \$3.25 per gallon, upon the faith of the written guarantee of the defendant, Humphrey, that it would be paid; and that he caused Humphrey within due and reasonable time to be notified that his offer as guarantor of payment had been accepted by the vendor. Held, sufficient to constitute a cause of action.

Actions—Contract For Sale of Whiskey—Instructions.

An instruction, "that the whiskey, sold in March, 1868 x x x and that defendant had notice during the spring of that year," held, erroneous in that the time of notice to the guarantor was unreasonable, and indefinite.

Guarantor—Notice of Acceptance—General Rule.

A person proposing to become guarantor for another is not to enquire as to the acceptance of his proposal: the creditor who intends to hold him liable for the debt of another, must show that he had reasonable notice of such intention.

Notice—Acceptance of Guarantor.

An instruction that a guarantor had notice "during the spring of 1868," not sufficient to constitute notice to the guarantor that he would be held liable on his guarantee, in that it was too indefinite.

APPEAL FROM GALLATIN CIRCUIT COURT.

September 20, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The facts stated in the original and first amended petition did not constitute a cause of action against appellant, and his demurrer to them should have been sustained; but after a verdict and judgment had been rendered against him, a new trial was awarded, doubtless on account of the insufficiency of appellee's pleadings, whereby the error in overruling the demurrer was cured.

Afterwards, numerous amendments were offered at different times, all of which were adjudged insufficient, except the one offered last, to which an answer was filed traversing the material allegations thereof, and a second trial having resulted unfavorably

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to appellant, and his motion for a new trial having been overruled, he now seeks a reversal of the judgment rendered in the case, on three *principal* grounds:

First. That the court below abused a sound discretion in permitting so great a number of amendments to be filed, and,

Second, that appellee's petition as amended was still insufficient, and a judgment could not have been properly rendered against him in the case.

These two objections will be first considered in the order in which they are stated.

One of the prominent objects of the Civil Code is to prevent the sacrifice of meritorious causes to technical rules, and to the omissions and mistakes of attorneys; hence the adoption of various sections, and especially section 161 Civil Code, whereby it is made the duty of the court, before trial, as we understand it, to allow such amendments as may be necessary for the furtherance of justice; even though their effect be to present an entirely different cause of action from that first stated. Or one that could not have been joined with the cause of action stated in the original petition. Or to change entirely the grounds of defense. But they should be allowed on proper terms, such as would be just to the opposite party.

This question we regard as settled by this court in *Hord v. Chandler*, 13 B. Mon., 403.

The amendments complained of in this case are based on the same transaction relied upon in the original petition as the foundation of the action—they all relate to the same subject matter. Do not seem to have been offered in any vexatious spirit, but with a desire to present, in legal form, for the attainment of substantial justice, the facts of the transaction by which appellant's liability must be tested. And we cannot say from the circumstances of this case that the indulgence allowed by the court was unauthorized or improper.

Although somewhat obscured by repetitions and redundancy, still the allegations are made and can be found in the last amended petition to the effect that appellee did sell and deliver to W. W. Sheppard a barrel of whisky, containing 42 gallons, at the price of \$3.25 per gallon, upon the faith of the written guaranty of appellant that the same should be paid; and that he caused him within due and reasonable time to be notified that his

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offer to guarantee the payment of the price for which the whisky was sold and delivered to Sheppard had been accepted by the vendor, which seem sufficiently explicit and direct to hold appellant responsible for the contract price.

But an error, which must be fatal to the judgment, is found in the first instruction given by the court, and to which appellant excepted. It is in the following words: If the jury believe from the testimony that the barrel of whisky was sold and delivered by plaintiff to Sheppard upon the faith of the order from Humphrey in March, 1868, and that defendant had notice *during the spring of that year*, from Hobbs, or his clerk, that the whisky had been delivered in accordance with the order of guaranty, he is liable for the value thereof, in the event they further believe that the whisky has not been paid for.

In *Steadman v. Guthrie, &c., 4 Met., 147*, this court held the rule to be, that a person proposing to become guarantor for another is not bound to inquire as to the acceptance of his proposal; the creditor, who intends to hold him responsible for the debt of another must show that he had reasonable notice of such intention. By the instruction, the jury were told, in effect, a notice to appellant *any time within the spring of 1868* would be sufficient to hold him liable, which would embrace a period of sixty days, as the whisky was sold on the 31st of March, and the spring closed the 31st of May. It is not shown by the evidence what was the distance between the residences of these parties, but it does appear that the written guaranty is dated the 28th of March, and was produced to appellee on the 31st of the same month; consequently, we may assume the distance between them was not very great; besides, with the facilities of transporting communications then in the country, it does not appear that a notice given at the expiration of the time allowed in the instruction would be reasonable. The *onus* to show that reasonable notice had been given of the acceptance of the guaranty of appellant was on appellee, and such notice as is allowed by the instruction could not be considered reasonable—which must be determined by the distance the parties resided, or did business, from each other, and the facilities of communication.

Wherefore, the judgment is reversed, and the cause remanded for a new trial, and for further proceedings consistent herewith, and it is proper to suggest that as the various amended petitions

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were not made necessary by any fault of appellant, appellee should pay the costs thereof.

Landram, for appellant.

Major, for appellee.

O. HOLT v. COMMONWEALTH.**Courts—Jurisdiction After Fixing Amount of Bail.**

After hearing all evidence, and entering up its judgment, fixing the amount of bail, and committing the accused to jail, the examining court, has discharged all its duties, and its jurisdiction terminates by operation of law.

Same—Memorandum by The Court.

Two days after the examining trial, the court changed its order of bail by increasing the amount from \$500 to \$1000. Held to be without his jurisdiction and without authority of law or judicial warrant.

Bail Bond—Void when Amount Changed, After Examining Trial.

A bail bond, cannot be changed after the examining trial, and a bond taken for a larger amount than that fixed at the trial is null and void.

Courts—Official Acts of The Judge.

In accepting a bail bond after commitment, the committing magistrate or county judge acts as a ministerial, and not as a judicial officer, and has no power to modify or revise such judgments or orders.

APPEAL FROM BALLARD CIRCUIT COURT.

November 1, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

Robertson alias Holt, charged with felony, had an examining trial before the presiding judge of the Ballard county court, on the 16th day of February, 1869. He was required by said examining court to give bail in the sum of five hundred dollars for

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his appearance at the next term of the Ballard circuit court, and in default thereof was committed to jail.

Two days thereafter said magistrate of his own motion, in the absence of the accused, and without even the forms of a judicial proceedings, made a memorandum (termed by him an order) upon the minutes of the examination to the effect that he had raised the amount of bail required from five hundred to one thousand dollars. On the 22d of February, appellant, as surety for the prisoner, executed to the Commonwealth a bond in said last amount, which was accepted by the committing magistrate, and the accused was released from custody.

This bond was forfeited, and a judgment rendered upon the forfeiture, and from said judgment an appeal is prosecuted to this court.

The examining court, after hearing all the evidence and entering up its judgment as to the probable guilt of the prisoner, fixing the amount of his bail, and committing him to jail by reason of his failure to give the same, had discharged all the duties imposed and exercised all the powers conferred upon it by law. As a *judicial tribunal* it was *functus officio*. Its jurisdiction had terminated by operation of law, and could not be revived at the mere will of the magistrate. Hence the memorandum, or order, increasing the amount of bail was wholly unauthorized and consequently null and void.

By section 61, Criminal Code,

“The defendant after commitment, and before the commencement of the next term of the court having jurisdiction to try the offense, may be admitted to bail in the sum *fixed by the committing magistrate*, by such committing magistrate, or by the judge of the county court.”

In accepting the bail bond after commitment the committing magistrate or county judge acts as a ministerial and not as a judicial officer. He can take a bond in the amount “*fixed by the committing magistrate*” and in no other amount. Ministerial officers enforce the judgments and orders of judicial tribunals, but they have no power to modify nor revise such judgments or orders. The committing magistrate could have required and accepted a bond of five hundred dollars, but in willfully and arbitrarily requiring the bond for one thousand dollars he acted without authority of law and without judicial warrant. It, therefore,

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follows that said bond has no legal vitality, and is not binding upon the surety either as a statutory or common law obligation. It is not merely informal, as it might have been had it been taken for an improper amount through the inadvertance or mistake of the officer, but is absolutely void.

The judgment appealed from is, therefore, reversed, and the cause remanded, with instructions to dismiss the proceedings upon the alleged forfeiture.

White & Reaves, for appellant.

D. A. HAUSMAN v. M. LYLES.**Equity—Annullment of Judgment in Ordinary Action.**

A proceeding in equity cannot be maintained to annul a judgment in an ordinary action, for a defense not discovered since the rendering of the judgment, but of which the plaintiff was fully aware.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

November 2, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellee, My Lyles, having acquired the note of the appellant, D. A. Housman, for \$99.78 by assignment from George Shell, the payee, while Hausman held Shell's note, then due, for \$100, by assignment from Quigley and King, Lyles sued Hausman on his note, and the latter, unwilling to plead the debt of Shell as a set-off to the action against him, which it clearly appears he might have done successfully, brought a separate suit on the note held by him, making Lyles a defendant, as well as Shell, and seeking, in effect to set off one of the debts against the other.

Without an answer in either case, both plaintiffs obtained judgments for their respective debts against the obligors. But it appears a motion of Hausman to consolidate the two suits was made and overruled before the judgments were rendered.

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After the judgments were obtained, Hausman presented a petition to the court, alleging substantially facts which, if they had in apt time been pleaded as a set-off to the note of \$99.78, would have constituted a bar to the action thereon; and he thereupon moved the court to render a judgment setting off one of the judgments against the other, and that motion being overruled, Hausman has appealed to this court.

Under section 407 of the Civil Code of Practice: "Judgments for the recovery of money may be set off against each other, having due regard to the legal and equitable rights of all persons interested in both judgments." And the set-off may be ordered upon motion after reasonable notice, when both judgments are in the same court, or in a suit in equity in the court in which the judgment sought to be set off was rendered. As no previous notice had been given of the appellant's motion in this case, though it was entered on the motion docket a short time before it was disposed of, it is obvious that no error was committed in merely overruling it; but as the court would not entertain the petition which was presented by the appellant, for any purpose, it is contended for the appellant that it erred in virtually deciding that the set-off sought by the petition ought not, on the grounds disclosed, to be adjudged in equity. The effect of the petition was to set up as against Lyles the incidental right of set-off, which existed against the note of \$99.78 when it was transferred by Shell, and as has been shown, might have been made available as a legal defense to the suit of Lyles. Therefore, the relief asked by the petition was virtually to annul by a proceeding in equity Lyle's judgment obtained in an ordinary action, for a defense not discovered since the judgment was rendered, but of which the appellant was fully apprised from the time of Shell's assignment of the note to Lyles, which is expressly prohibited by the 14th section of the Civil Code of Practice.

Wherefore, the judgment is *affirmed*.

Bramblett, for appellant.

Bryce, for appellee.

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H. C. KING v. S. H. BOLES ET AL.

Attorney and Client—Negligence of Attorney in Not Communicating Facts to Client.

A client cannot claim the benefit of the negligence of his attorney in not communicating facts as to the progress of the case.

New Trial—Facts Within the Knowledge of the Attorney.

It is no cause for a new trial that an attorney did not communicate all the facts to them, alleged in his affidavit. What he knew, they should have known.

Deposition—May be Used by the Adverse Party, Though Suppressed.

The deposition of a witness, though suppressed on exceptions, may be used by the adverse party to contradict any sworn statement he may make in the cause during its progress.

Champerty—Contract Made After Suit in Progress.

Where a contract, alleged to be champertous, is made while the suit was pending and on which one trial was had it is not within the inhibition of the statute.

APPEAL FROM RUSSELL CIRCUIT COURT.

November 4, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The appellee, M. Lyles, having acquired the note of the appellant, D. A. Hausman, for \$99.78 by assignment from George Boles and others to set aside a contract made with said Boles for the sale of their interest as heirs of their mother, the said Rebecca Thomas, in the estate of Chirstopher Ellis, deceased. After a somewhat protracted litigation the plaintiff's petition was dismissed by the court below, they prosecuted an appeal to this court which resulted in a reversal of the judgment, and a mandate directing a judgment to be entered in the court below vacating the contract as between John M. Thomas, E. B. Thomas, and Stevenson and wife, but as to Levi Thomas the judgment was affirmed.

Upon the return of the cause, the court below entered a judgment in conformity substantially to the mandate of this court,

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except that Stevenson and wife were each adjudged to be entitled to an undivided one-sixteenth of the estate of C. Ellis, deceased, instead of adjudging to both only one-sixteenth, Stevenson being entitled to nothing except in right of his wife, who is one of the four children of Mrs. Rebecca Thomas; but that error has been corrected by a remittur on the record, and no further notice need or will be taken of it. And in order to ascertain the value of the estate of C. Ellis, and the amount the parties were respectively entitled to the case was referred to the master.

At the same term at which the mandate and judgment were entered in April, 1861, the record shows that the plaintiffs "*filed*," not offered to file, an amended petition in the case, and produced deeds of conveyance from John Thomas, Stevenson and wife, and E. B. Thomas, transferring their interest in the matters in controversy in the action to H. C. King, and thereupon King moved the court to substitute him as plaintiff in the action, and permit him to prosecute it in his own manner—and that motion was continued.

Then came the defendants, as the record shows, "and produced their petition and grounds for a new trial, and produced their affidavits which were ordered to be filed, and moved the court to grant them time to procure the affidavits of the persons mentioned in said grounds for a new trial," and the motions were continued.

The amended petition of plaintiffs with the deeds to King are copied and constituted a part of the record.

Four causes are assigned as grounds for a new trial. The *first*, *second* and *fourth*, if they existed, were such errors as if properly presented and ruled upon might have been corrected by this court, but as that was not done, they cannot now be considered as forming grounds for a new trial. *McLean v. Nixon*, 18 B. M., 768.

If, then, any of the causes assigned for a new trial by appellees can be available to them it must be the *third*, which is on account of the discovery of *new, important*, and material testimony, since the trial, which they could not with reasonable diligence have procured, and had at the trial.

For the character and importance of the evidence, and the reasons for not producing it, the affidavits of Boles and of Bledsoe and Owsley filed with said grounds are referred to.

Boles states that being a member of the Senate of Kentucky, which was in session at the time of the trial of the case in December, 1859, he was attending to the duties of his office, in Frankfort,

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and was thereby prevented from being present at the trial. He states that the plaintiffs, or all of them except E. B. Thomas, had full knowledge of the value and condition of C. Ellis, deceased, before they sold to him, and E. B. Thomas may have had the same information, and affiant believed he had. That plaintiffs had conversed with Samuel Parker about the estate and knew the extent and value thereof, and upon consultation with said Parker as to the propriety of selling, he advised them not to make the sale. That J. N. Brown, whose deposition in the case, will state, and it is true, that the letter written by R. C. Logan to the plaintiffs, giving them information in relation to the amount and value of the estate of C. Ellis, deceased, had been received by them before they made the sale to affiant. That he did not know that Brown's deposition was to be taken at the time that interrogatories were filed by plaintiffs, and the filing interrogatories by defendants to take the depositions of Jesse Hall and others—and that he did not know that said Brown's deposition was then to be taken, and could not be present lawfully at the taking of said deposition. That it is true, and he can prove by the justice before whom the depositions of Hall, Parker and Bozwell were taken that notwithstanding said deposition were taken on interrogatories and cross-interrogatories, and neither party ought to have been present, that the answers to the interrogatories of Oscar Parkers deposition were written out by H. C. King and handed to the justice, and by him copied into the deposition, and that he was informed by the justice the answers of the other witnesses were in like manner written out by King, handed to the justice, and then by him copied into the deposition. That in the last few weeks he had discovered from looking over his memoranda that one Davis, who lives in Springfield, Ill., was present in the bar-room of Samuel Parker, and heard all the conversation between affiant and John M. Thomas, and he can prove by him that no such conversation took place as the one detailed by Jesse Hall. That immediately after the taking of the depositions in Missouri, plaintiffs gave notice to take depositions in Paducah, and he had no time then to take the depositions in Missouri before the December term, 1859, of the court commenced, and the facts here stated he did not communicate to his co-defendants before the trial and that the witnesses by whom he could prove the foregoing facts lived in Missouri and Illinois.

The substance of Boles' affidavit is given because it is fuller

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than that of the other defendants and is referred to by them.

There is not a fact stated in that affidavit that was not known, or could not have been known by Boles before the trial. Indeed, he states in effect that he did know them. And it appears in his deposition, which was on file before the trial, that he was in Missouri when the depositions of Hall and others were taken. It furthermore appears in the case that after Hall's deposition had been taken, and before the parties separated, he was present, asked to see it, it was shown to him, he saw the answers in pencil on the table in King's handwriting, and must have communicated all these facts to his clients, or if he did not, it is no cause for a new trial, because what he knew the other defendants should have known, or cannot avail themselves of the want of that knowledge.

But it is insisted that as Bowles' deposition had been suppressed on exceptions filed by appellants thereto, that it could not be looked into for any purpose—and that although this deposition might contradict an affidavit made by him, yet it was a sealed paper for all purposes; such is not the law, nor is the position consistent with reason. It can be used by the adverse party to contradict any sworn statement he may make in the cause during its progress.

Before the trial the first time appellees, Owsley and Bledsoe, moved for a continuance of the cause on grounds set forth in an affidavit filed by them, in which they make no objection to the trial on account of the absence of Boles, and state the facts they can prove by Brown and Parker, two of the witnesses named by Boles in his affidavit, all of which statements were admitted. So that it is manifest they have discovered no witness by whom any material facts can be proved that they were not aware of, or with reasonable diligence could not have been known. Consequently, no good cause has been made out for reviewing and vacating the judgment entered in conformity to the opinion of this court.

The amended petition filed after the mandate of this court was entered without objection showed H. C. King's interest, and he being thus interested had a right to prosecute this appeal.

If there was anything in the contract between King and clients prohibited by law, it has not been attacked by them; on the contrary they ask by their amended petition for its enforcement. As to the champerty question, the suit was pending when King's contract was made, and before that time, it was not, therefore, a contract within the inhibition of the statute against champerty.

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It may be assumed that the suit which had been in progress for years, and in which the rights of the parties had been substantially settled, would have been prosecuted as it has been if no contract had been made with King. *Chiles v. Conley's Heirs*, 9 Dana, 385.

Wherefore, the judgment awarding a new trial and vacating the judgment entered after the return of the cause to the circuit court is *reversed*, and the cause is remanded for further proceedings consistent herewith. The contract which plaintiffs, in their amended petition, alleged they made with H. C. King as they seek to have the same carried out the court below will proceed to execute, and the residue which plaintiffs would be entitled to passed by their subsequent contract to appellees, and they are entitled to the same.

King, for appellant.

James, Owsley, Alexander, Winfrey, for appellees.

E. R. RAY v. B. M. WALKER ET AL.**Evidence—Co-incidence of Names of Plaintiff in Another Suit, Offered.**

Depositions in another suit, were offered as evidence, in which "Burns M. Walker" as a defendant testified, and was sought to be used in this suit wherein "B. M. Walker" was a plaintiff, to prove his contradicting statements. Held that the presumption of identity arising from the co-incidence of names, in the absence of any evidence to repel it, was *prima facie* sufficient as a slight evidence of identity.

APPEAL FROM HICKMAN CIRCUIT COURT.

November 2, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

This appeal is prosecuted for the reversal of a judgment of eviction in an ordinary action for the recovery of a lot in the city of Columbus. The appellees, on the trial, sought to establish their title by proof of a continuous adverse possession of the lot by them

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and their ancestor, William Walker, under whom they claimed, for over twenty years before the appellant acquired the possession, and for that purpose they produced and offered to read as evidence to the jury an answer of the defendant filed in a suit of Edward Curd's executors against him, containing statements to the effect that Burns M. Walker, and those under whom he claimed, were and had been in the adverse possession of the lot from the time he acquired his claim from said executors; and without any proof identifying Burns M. Walker as one of the plaintiffs, except the coincidence of his name with that of one of the plaintiffs, the court overruled an objection of the defendant to the admission of the answer as evidence and permitted it to be read to the jury; and whether this ruling was correct or not is the principal question presented by this appeal.

Undoubtedly some proof identifying Walker as one of the plaintiffs, or of those under whom they claimed, was necessary to render the answer admissible; but as slight evidence of that fact was *prima facie* sufficient, we think the presumption of identity arising from the coincidence of names, in the absence of any evidence to repel it, was sufficient for that purpose, and the court properly so ruled. (*1 Greenleaf on Evidence, section 512.*)

We perceive no error in the action of the court, either in instructing the jury or overruling the motion for a new trial.

Wherefore, the judgment is *affirmed*.

Rodman, for appellant.

Bullock, for appellees.

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W. C. TRABUE ET AL V. SANDERS & WILLIAMS.

Mines and Mining—Removal of Coal Adjacent to Main Entry—Damages.

Where the proof shows that a lead in a mine would not terminate at a point contemplated by the parties to a contract for lease of a mine, but at a point wholly impracticable to reach the coal to be mined, nominal damages for destruction thereto only could be recovered.

Same—Defense—Plea that Better Coal Was Opened Up.

A plea, in defense to a suit for violation of a contract, that by reason of opening up of a new passage way, and closing of the old one, in that more and better coal was thus left than was taken from the pillars supporting the portion of the entry destroyed, held not good.

Same—Betterment to Owner of Mine—Duty of Lessee.

It is the duty of the lessee to work a leased mine as not to render unnecessarily difficult, the mining of such coal as they might choose or be compelled to leave at the expiration of their term.

Same—Mistake in Lease—Exceptions Reserved—Covenant.

A lease permitting the lessee to mine coal, but to preserve the "main entry" by leaving pillars sufficient on either side to support it, and with "this exception" to remove all coal, etc., held that the words in the form of an exception amounted to a covenant to preserve the supports and leave open the passage way as much as to preserve the entry itself.

Pleading—Demurrer to Petition For Damages For Removing Supports to a Coal Mine.

A petition seeking to recover damages for the removal of pillars, stipulating "to preserve the main entry by leaving pillars on either side sufficient to support it" is not demurrable, though the plaintiffs could not recover as in trover and conversion.

Same—Mines and Mining—Criterion of Damages.

As a criterion of damages, the difference in the value of the mines, in the condition they were restored to plaintiff on the day the lease expired, and what their value would have been in case "pillars sufficient to preserve and leave open" the main entry, had been left as stipulated.

Same.

The enquiry should be confined to the difference in value on the day the lease expired, and should exclude any consideration of the value of the entry as a passage-way.

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APPEAL FROM M'LEAN CIRCUIT COURT.

October 2, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

On the 7th of July, 1858, appellees Sanders and Williams leased from the heirs of C. H. Trabue, deceased, for the term of five years certain coal mines situated in the county of Hancock.

By the terms of the written agreement between the contracting parties the lessees secured the privilege of taking all or any part of the coal from the mines therein described, within the term of five years, and among other things they bound themselves to preserve the "Main Entry" into what was known as the lower bank by leaving pillars on either side "sufficient to support the same, and leave it open. With this exception the parties of the first part *had* the right to draw and remove all the pillars and mine all the coal from the lands of the parties of the second part."

In February, 1866, the Trabues brought their suit in the Jefferson court of common pleas, alleging that their lessees had broken their said covenant by failing to preserve the "main entry" and by removing the pillars necessary to support it, and converting the coal mined from such pillars to their own use, by reason thereof they claimed that the entry was wholly destroyed for the distance of over three hundred yards, and thereby deprived of the use of their mines, and also of a road or pass-way by which to reach other valuable mines, and they prayed judgment for damages in the sum of \$75,000. Two amendments were afterwards made to their petition, setting out in detail the specific reasons upon which they based their claim for damages, but not materially modifying their cause of action as originally set out.

Appellees, by their answer, admit to the mining of the coal composing the pillars supporting a portion of what was generally known as the "main entry" into the lower bank, and that they thereby closed a portion of such entry, but they denied that the part thus destroyed lead to any coal in the Trabue mines, or to coal in any adjacent mines belonging to the Trabue heirs or to any one else. They claimed that the term "main entry," as used in the lease, was not intended to be descriptive of any particular

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entry, from the mouth to the back of the mines, but as descriptive of what might prove to be the most available passway leading into the body of the coal then remaining in the mines. They concede, however, that all parties at the time of the execution of the written contract regarded the entry, a part of which they destroyed, as the passway leading into that portion of the mines in which coal was to be found, but allege that this belief, and consequently the insertion of the term "main entry" into the agreement, grew out of the mutual mistake of all the parties as to its real location in the hill. They admit that the intention of the covenant for its preservation was to secure a road connecting with what is known as Lead Creek valley by a tunnel leading through appellant's mines, terminating in that valley at or near the base of the hill in which the mines are situated, but they claim that they ascertained after they began work that this tunnel, if extended, would terminate in the summit of the hill instead of at its base. That for this reason they mined the coal composing the pillars supporting the back part of the entry, and left certain other entries open, and thereby effectuated the true intention of the contracting parties. They denied that they had damaged the mines by drawing the pillars, and insisted that they benefitted them by the manner in which they carried on their mining operations. They also pleaded a release from one of the lessors.

Appellees, before answer, demurred to the original and amended petition of the Trabues, and various motions to strike out portions of the pleadings were made by both appellees and appellants. Finally, appellees offered to file an amended answer setting up the statute of limitations as a bar to appellant's claim for the conversion of the coal taken out of the pillars supporting the main entry.

The action was transferred by change of venue to Hancock county, and afterwards to Breckinridge, and finally to McClain county, where it was submitted upon the pleadings, and the evidence to the judge of the circuit court to be determined by him without the intervention of a jury.

By his judgment the second amended petition was stricken from the files, and the demurrer was sustained to so much of the petition as amended, which sought to recover for any other damage than that growing out of the destruction of the "main entry" considered as a road or passway, and finally dismissed the petition and amendments, giving to appellees a judgment for their costs.

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We do not regard it necessary to review in detail the voluminous testimony presented by the record. Considering the evidence as set out in the bill of exceptions and disregarding the affidavits relied upon by appellees as establishing the incorrectness of such bill, we conclude that the "main entry," in so far as it might have been used as a road leading to any coal in the mines of appellants, or as a passway to Lead Creek valley, was comparatively valueless. It is not shown with any reasonable degree of certainty that coal in such quantities and of such quality as will probably induce parties to work the mines, exists in the lands lying on Lead creek. And it is satisfactorily proved that the coal in the mines of appellants was practically exhausted in the vicinity of that portion of the main entry which appellees destroyed. We are also satisfied that even if coal exists in the region of Lead creek the entry destroyed would have terminated so near the summit of the hill as to have made it wholly impracticable to reach such coal by that route. It follows, therefore, that in so far as appellants sought to recover for the value of that part of the entry destroyed, considered merely as a road or passway, they were entitled at most to no more than nominal damages. Whether they can recover for the removal of the pillars on account of their intrinsic value, disconnected from any idea of the preservation of the entry, must be determined by ascertaining the legal construction of the covenant under consideration.

By the contract appellees, in general terms, acquired the right to draw all the pillars and mine all the coal from the leased premises, but they obligated themselves to preserve the "main entry" by *leaving pillars on each side sufficient to support the same and leave it open.* Their right to draw all the pillars and to mine all the coal, was to be exercised within the five years during which the lease continued. The absolute title to the coal was not vested in the lessees. They had merely the right to take it, or so much as they might choose, or be able to take within the prescribed time. All that they might leave at the expiration of their term, by the terms of the contract and as matter of law reverted to the lessors. Hence the plea that more and better coal was left in the mines than was taken from the pillars supporting that portion of the entry destroyed, we do not regard as an available defense. Neither are appellees exempt from liability for the breach of their covenant because they benefitted the appellants in other respects by the

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judicious manner in which they may have conducted their mining operations. It was their duty to so work the mines as to not render unnecessarily difficult the mining of such coal as they might choose or be compelled to leave at the expiration of their term. The alleged mistake of the parties as to the location in the hill of the main entry is also insufficient as a defense, in so far as the intrinsic value of the pillars destroyed is concerned. It is not pretended that the term "main entry" was inserted by mistake, but that the parties were induced to insert it, because they were all mistaken as to the existence of a certain other fact. Possibly if this mistake had not existed the contract would have been different, but as the parties, when the mistake was discovered, did not change it, and as those who would have been benefitted by the change did not ask to have it changed, we are of the opinion that appellees were bound to comply with their covenant as it was written. The principal object sought to be attained by the preservation of the entry was to secure a road or passway to Lead Creek valley, but the parties chose to stipulate the exact manner in which the entry should be preserved, and the language used makes it manifest that importance was attached to the manner of preservation as well as to the property to be preserved. The covenant is that the "main entry" should be preserved by leaving pillars sufficient on either side to support it, and leave it open, and with "this exception" the appellees had the right to draw and remove all the pillars and mine all the coal from the leased premises. No right was acquired to remove such pillars as might be necessary to preserve and leave open the designated entry, but upon the contrary, it was stipulated that such necessary pillars should not be removed. With the exception of pillars sufficient to accomplish the desired end, they had the right to draw and remove all the rest. "Words in the form of an exception may amount to a covenant; as where a lessee agreed that he would 'during the term plough, sow, manure and cultivate the devised premises (except the rabbit-warren and sheep-walk) in a regular and due course of husbandry according to the custom of the county.' The exception was held to be as much of an agreement as the rest of the stipulation in which it was placed, and to impose a direct obligation not to plough the rabbit-warren and sheep-walk. So were the words that A should take x x x without taking more than was necessary." *Taylor on Landlord and Tenant, section 248.* The exception of pillars sufficient to support

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and leave open the main entry was, in this case, as much an agreement as the stipulation to preserve the entry itself. The failure of appellees to leave the leased premises in the condition agreed upon was a violation of their covenant, for which they are responsible in damages. We have before stated that the evidence warrants the conclusion that the entry was comparatively valueless as a passway, and as this question was submitted to the judge without the intervention of a jury, and considered by him, his judgment as to this branch of the case will not be disturbed. We do not decide that appellants were not on this account entitled to nominal damages and to a judgment for their costs, nor that this court will not reverse where a judgment refusing nominal damages and costs is palpably against the weight of the evidence, but in this case as the judgment must be reversed for another reason, its affirmance as to this branch of the controversy cannot prejudice the substantial rights of the appellants.

The court below erred in sustaining the demurrer to the petition and amended petitions of appellants in so far as they claimed damages for the removal of the pillars excepted by the terms of the lease. They were not entitled to recover as in trover and conversion, but as the facts set out entitled them to a judgment for the actual damages sustained by reason of the removal of the excepted pillars, under the provisions of the Code of Practice the general demurrer should have been overruled. To this extent, the judgment is reversed, and upon the return of the cause the court should require the parties to so shape their pleadings, as to present the question as to the difference in the value of the mines in the condition they were restored to plaintiffs on the day the lease expired and what their value would have been in case "pillars sufficient to preserve and leave open" the main entry had been left as stipulated. The enquiry should be confined to the difference in value on the day the lease expired, and should exclude any consideration of the value of the entry as a road or passway. As the right of the appellants to recover grows out of the violation of a covenant contained in the written agreement of the parties, and is not in the nature of an action of trover and conversion, the five years statute of limitations does not apply. The release executed by W. C. Trabue applies alone to the rental agreed to be paid and presents no bar to this action.

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The cause is remanded for a new trial and for further proceedings consistent with this opinion.

Bullitt, Harris for appellant.

Williams, for appellees.

R. J. ORMSBY ET UX v. J. A. ZANONE ET UX.

Wills—Dower—Use to Wife For Life.

A will bequeathing to a wife certain specific personal property to be by her disposed of as she may deem best, does not give to her an additional dower interest in the remainder of the personal property.

Same—Devise—Limitation.

A devise to children, in "all my estate, real, personal and mixed, subject to the dower interest to my wife, as specified in the second clause above," held to limit the dower to the use of the personal and real property during life.

APPEAL FROM LOUISVILLE CHANCERY COURT.

November 2, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The only question presented for adjudication in this case is whether Mrs. Eliza McCrum owned the stock which she attempted to dispose of by her will, or did they pass by the will of her deceased husband?

The solution of that question depends upon the proper construction of the *second* and *third* clauses of the will of her husband, the late James McCrum, probated in 1853, which read as follows:

Second. I give unto my beloved wife in addition to dower allowed by law in my estate, the use of all my household and kitchen furniture of every description, and the slaves of which I may be possessed at my death, to be held, and owned by her,

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during her life, and to be disposed of in her will as she may deem proper.

Third. I give and devise to my friends, Angerean Gray and J. B. Bowles, and the survivor of them, their heirs, etc., all my estate, real, personal and mixed, wheresoever situated, subject, however, to the *dower* interest of and devised to my said wife as stated in the second clause hereof, to be by them held in trust for the sole, separate and exclusive use, and benefit of, and the rents, issues and profits thereof, to be equally divided between, and paid over to my daughters, Anna Mercer, wife of M. Johnson, and Eliza Boots McCrum, etc.

These quotations contain all the will of James McCrum in relation to this subject.

At the April term, 1853, on motion of the widow, certain gentlemen named were appointed by the Jefferson county court to set apart, and allot to her, dower in the estate of her late husband, the persons allotted to her dower in the real estate of her said husband, and set apart to her under their appointment thirty-five shares of stock in the Bank of Louisville, eleven and one-half shares of stock in the Mechanics' Bank, eight shares of stock in the Franklin Insurance Company, and four shares in the Louisville Gas Company, which they state they considered equal in value to one-third of the stock owned by James McCrum.

By her will, probated in September, 1868, Mrs. Eliza McCrum attempted to bequeath to the sole and separate use of her daughter, Eliza R. Ormsby, all her stock in the Bank of Louisville and in the Mechanics' Bank in said city, and all money, personal estate, stocks, &c., which she owned at her death.

Mrs. Johnson, a daughter of testator, had died previous to the publication of the will of her mother, and the appellee, Mrs. Alice Zanone, her only surviving child, took the estate devised to her mother in trust by her grandfather.

This suit in equity was brought by Zanone and wife in the court below against Pope, the executor, Mrs. Ormsby, the legatee of her mother, and Robert Ormsby, her husband, for partition of certain real estate, including that which had been set aside to his widow for dower, which had belonged to the testator, and for an equal division of the stocks before named, alleging that they constituted a part of the personal estate of the testator, and that they passed by his will to the trustees therein named for the benefit

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of his two daughters, that his widow was not entitled to them and could not dispose of them by will. This claim to one-half of said stocks was resisted by the executor and legatees of Mrs. McCrum; but the court below adjudged to Mrs. Zanone the one-half thereof, from which Ormsby and wife have appealed.

The word dower has a *technical*, legal signification. By the common law it is the one-third part of all the lands and tenements whereof the husband was seized at any time during coverture, which the surviving wife became entitled to, on the death of her husband to hold to herself during her natural life. 2 *Black Common*, p. 129.

By the statute law of this State it is defined to be the one-third of the real estate whereof the husband, or any one for his use, was seized of an estate in fee simple at any time during coverture, which the wife takes for the term of her life, on the death of her husband, unless her right thereto has been barred, forfeited, or relinquished. 2 *Vol. Stan. R. S.*, p. 23.

This legal, well defined meaning being given to the word *dower* the testator must be presumed to have understood it when he used it in the two clauses of his will referred to, and there is nothing in the whole context showing that when he was disposing of his estate "subject to his wife's dower interest," he did not refer to his real estate, and was reserving to his widow her dower in it, and as there is nothing in the will indicating that the testator did not fully understand the legal import of the term when he used it, we are not authorized to give to it an extended meaning and make it embrace personal estate.

Wherefore, the judgment must be *affirmed*. No complaint is made of the judgment for the partition of the real estate.

Pope, for appellants.

Muir & B., Wolley, for appellees.

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ISAAC CALHOUN v. SAMUEL A. JOHNSON.

Principal and Surety—Counter Security Given by a Wife to One Surety on Bond.

Counter security given by a wife to a surety on her husbands guardian's bond, does not enure to the benefit of all the sureties thereon.

Same.

Her property, thus liable, would not be subject to sale by the surety, until a pro rata distribution of liability had been adjudged, and he had been compelled to pay same.

APPEAL FROM M'LEAN CIRCUIT COURT.

November 2, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

As Mrs. Shrader was a stranger to the guardian's bond by her husband as principal and Calhoun, Johnson and others as sureties, her mortgage of her estate to indemnify Calhoun alone against his own contributory liability does not enure to the benefit of his sureties as the like mortgage of the guardian's estate might have done in equity.

Calhoun alone can enforce that mortgage for his own indemnity against ultimate loss which may result after final contribution among all the co-sureties, until such adjustment showing the loss for which alone the mortgage assures indemnity, he cannot enforce that security.

As no such final contribution is shown to have been completed among the co-sureties of their insolvent principal and therefore Calhoun's ultimate loss has not been ascertained, the circuit court erred in adjudging to the appellee Johnson, as one of the co-sureties the whole fund deposited in court, by another co-surety. That fund should not be disturbed until full and final contribution shall have fixed Calhoun's loss, and then, and not sooner, he may proceed on his mortgage.

Wherefore, the judgment is reversed, and the cause remanded

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for further proceedings for adjusting the contributory liabilities of all the sureties.

Owen, for appellant.

Johnson, for appellee.

RICHARD W. WINIP v. JOHN H. PAYNE ET AL.**Guardian and Ward—Purchase of Property by Guardian—Trusts.**

The purchaser of property by a guardian, in which his wards claim an interest, is held to enure to the benefit of said wards, though the deeds be taken in the name of the guardian individually.

APPEAL FROM MEADE CIRCUIT COURT.

December 8, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Winip brought his suit in equity in the Meade circuit court in March, 1864, asserting title to one-fourth of a tract of about two hundred acres of land, situate in said county, under a conveyance from Thomas I. Payne, and seeking an order of injunction against the execution of a writ of possession obtained in an ex parte proceeding in the same court in the name of Payne, guardian, &c.

He claimed that said Payne had conveyed to him a deed bearing date March 15th, 1864, and that said deed was made in pursuance to a bond for title executed some two years prior to that date. Pending this action appellees brought their suit in equity in said court against Winip asserting title to the entire tract. Alleging that he was in possession of the same without right, and seeking to restrain Winip, and upon final hearing for all proper relief. Winip in his answer to this petition claims to have bought from appellees whilst they were minors and after he had been their statutory guardian, and that he also owned a portion of the land under a purchase made many years before from the Wintersmith heirs. The two suits were consolidated, and upon the trial Winip's

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petition was dismissed as to appellees, and a judgment rendered in their favor for the premium of the entire tract, and the case referred to a commissioner to take proof as to rents, and the enhancement of the value of the lands, by reason of any valuable and lasting improvements that may have been put upon it by Winip, and from this judgment he has appealed. We think the evidence fully sustains the conclusion that Thomas I. Payne sold to Peter K. and Charles C. Payne long before he had any transaction whatever with Winip, that he executed to them his bond for title to his interest in the land, and that this bond passed into the hands of Winip, when he became the statutory guardian of P. K. and C. C. Payne. This fact of itself was enough to make it impossible for Winip to buy from Thomas I. Payne two years before the date of his deed on the 15th of March, 1864, without an outrageous breach of his duty as guardian, such a breach of trust as would render his purchase void as to the appellees. The evidence does not sustain his assertion that he had purchased from Payne and held his title bond, prior to the time of his appointment as guardian. The receipt exhibited by him was evidently for a payment made by him as guardian on the purchase made by his wards. One of their notes to Thomas I. Payne was for the exact amount of said receipt, and the payment was made whilst Winip was acting as their guardian, and the receipt is too indefinite upon its face to establish the fact that it was for money paid by appellant on a purchase of his own.

Even if it be admitted that the certificate of the clerk to the deed from Thomas I. Payne to the appellees could be impeached in a proceeding to which said clerk is not a party, we regard the evidence upon that point, when carefully analyzed as sustaining the verity of said certificates rather than contradicting it. It is true there is proof tending to establish the fact that said Payne was at Mt. Sterling during the entire day upon which the deed purports to have been acknowledged at Paris, but the witnesses contradict each other, some stating that Payne, who was a soldier, was in arrest, and others that he was on duty during the whole of that day. Nor do they or any of them detail circumstances of such a character as would likely impress upon their minds the exact whereabouts of Payne upon the particular day upon which the deed purports to have been acknowledged. Upon the other hand, Payne himself, and a witness who is unimpeached, swears to the

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affirmative fact that from their own knowledge the deed and certificate bear their correct date. Winip's claim to any portion of the land under the Wintersmith purchase is not satisfactorily established by the evidence. We are inclined to the opinion that Patterson's deposition should have been excluded, but the judgment of the court is fully sustained by other evidence about the competency of which there can be no doubt.

The regularity of the proceedings in the ex parte suit, for the sale of the lands of the appellees had, whilst they were infants, need not now be passed upon by this court, as the judgment in this case must be the same however irregular they may have been. The relief granted to the appellees by the judgment appealed from is neither unauthorized nor extraordinary and as the same is warranted by the evidence said judgment is *affirmed*.

Walker, Fairleigh, for appellant.

Lewis & Kincheloe, for appellee.

HIRAM McELROY v. JOHN BARBEE, ET AL.**Mortgages—Rent—Demand for Possession of Property.**

Where the mortgagor, without an express contract for rent under a sale of the property, is permitted to retain possession, he will not be liable for rent.

APPEAL FROM UNION CIRCUIT COURT.

December 6, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The circuit court by its first decree in this case, adjudged the assignment of the bond for a title of the house and lot fraudulent and void as to the appellees as mortgage creditors and decided also that, as the holder of the legal title, was entitled to a prior lien for the unpaid consideration of about \$200 and as the appellant had satisfied that incumbrance for the benefit of the mortgagor

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and mortgagees, the debt for securing which the mortgage was given should be credited with the amount so paid. And on an appeal this court approved so much of the judgment as allowed that credit, but dissenting from so much of it as imputed fraud, adjudged an estoppel against the appellant's alleged equity to the house and lot on the ground that the assignment of the bond for a title to him did not take effect until after the mortgage, and also that he was privy to the mortgage and did not disclose his after asserted equity. After the return of the case to the circuit court, the sale of the house and lot to satisfy the mortgage debt not having produced enough for full satisfaction even after crediting the amount paid by the appellant, a judgment was rendered against him for the deficit of about \$240 for rent claimed by the appellees because he controlled the possession of the house and lot from the date of the mortgage to that of the decree.

As the court, in its former opinion, sustained the credit *as ordered by the circuit court*, we will not now enquire whether the appellant, instead of the mortgagor should have the amount so credited, but must treat this as *res adjudicata*. But we can not affirm the decree against the appellant for rent, as the mortgagor or the appellant as his substitute was permitted by the mortgagees to retain the possession without any express contract for rent, the law did not imply any liability to them for rent. If the mortgagees apprehend insecurity without the profits, their remedy was a demand of possession or the appointment of a receiver. But this remedy having been waived they cannot hold the occupant responsible for the use.

Wherefore on this ground the judgment is reversed and the cause remanded for a modification striking out the decree for rent.

Rodman, for appellant.

McElroy, for appellee.

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WILLIAM CARPENTER v. A. FOUNTAIN'S EXRX., ET AL.

Injunction—Dissolution—Remedy.

The dissolution of an injunction being only interlocutory, the remedy is an application to a judge of the Court of Appeals for reinstatement and not by appeal.

APPEAL FROM ROWAN CIRCUIT COURT.

January 4, 1871.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The important question whether the children of Fountain, deceased, are necessary parties and the infants are properly before the court, or whether the widow is the only essential party as defendant. Whether there is such a defect of title or deficit in quantity as to entitle the appellant to relief, either by compensation or rescission, are still pending in the circuit court for litigation and the petition is undisposed of. Consequently, the dissolution of the injunction, provident or improvident, being only interlocutory and, if improvident, the remedy being an application for reinstatement and not an appeal to this court, we have no jurisdiction.

Wherefore, for want of appellate jurisdiction, the appeal is dismissed.

Scott, for appellant.

Andrews, for appellee.

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JOHN R. UPSHAW v. W. D. CARBELT, ET AL.

Garnishment—Answer of Garnishee—Oral Examination Not Required—Depositions.

A garnishee has the right to appear in person and be examined orally or answer in writing, and if he adopts the latter mode he cannot be compelled to appear in person, after a transfer of the case to equity, to undergo an examination before the court, unless he is in contempt of court for failing to make a sufficient answer. His testimony should have been obtained by deposition.

APPEAL FROM FULTON CIRCUIT COURT.

January 5, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

If the appellant, was, as is insisted, only before the court as an ordinary garnishee, he had a right, under section 245 of the Civil Code, to appear in person and be examined orally, or answer in writing, and if he adopted the latter mode, he should not have been compelled to appear in person, after the transfer of the case to equity, to undergo an examination before the court, unless he was in contempt of court for failing to make a sufficient answer. But as the appellant was in this case formally made a defendant in the action, and properly so as the court decided on the demurrer, and the case was on the plaintiff's motion, transferred to equity, so far as appellant was concerned, the case should have remained for preparation and trial as any other suit in equity according to the provision of the code, and if the testimony of the appellant was desired it should have been obtained by his deposition or upon interrogatories before the final hearing, and it was both irregular and premature to force him into court to give oral testimony, and try the case on the result of that examination before the action stood for trial according to the rules of equity practiced and within the time allowed to parties for preparation.

Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Goalder James, for appellant.

Randle & Tyler, for appellee.

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J. M. CRENSHAW, ET UX v. WESTERN LUNATIC ASYLUM.

Limitation—Statute of—Death and Administration—Claim for Board, Clothing and Funeral Expenses.

More than four years had expired after the death of the ancestor before this suit was brought against her heirs; and consequently, the saving provided for in the Statute of Limitations was lost. If suit had been brought within two years after the death of intestate, the Statute of Limitations would not have been available as a bar, except as to so much of the account as was barred by time at the death of intestate.

APPEAL FROM GRAVES CIRCUIT COURT.

January 7, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

This suit was commenced on the 22nd of October, 1869, by appellee, against appellants, heirs of Agnes Milican deceased, to subject a tract of land which had belonged to decedent to pay the claim of appellee for board, clothing and funeral expenses furnished to, and expended for decedent. And the only defense relied upon is the Statute of Limitations.

The first item charged on the account filed is dated January 15, 1860 for six months board, and the charges for boarding are continued at the end of each six months to January 15, 1865, and then to the 12th of March of the last named year when Mrs. Milican died.

No administrator was granted on her estate nor does it appear that she left any personal estate.

Sec. 5, Art. 4, Chap. 63, R. S. pp. 132-3, provides that if a person against whom any action mentioned in the *3rd Article* of this Chapter may be brought, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative, devisee, or heirs, or all, after the expiration of that time, and within one year after the qualification of his personal representative; and if there is no personal representative, the

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action may be brought against his heirs, or devisees, or both, after the expiration of the time limited for bringing the same, and within two years after his death.

More than four years had expired after the death of the ancestor before this suit was brought against her heirs; and consequently, the saving provided for in the statute referred to was lost. If appellee had brought its suit within two years after the death of Mrs. Milican, the Statute of Limitations would not have been available as a bar, except as to so much of the account as was barred by time at the death of intestate, but as the action was not brought until more than four years after her death, as the statute is relied on, it operates as a bar to a recovery of all the account that was of over five years standing when the action was brought.

Appellee is allowed by statute to charge paying patients at the rates of \$160 per annum for board, *Myers Supp.*, p. 36, and at the rates of \$200 per annum from 24 February, 1865, *Ib. pp. 36-7.*

As the judgment of the court below was for more than under our construction of the statute, was authorized, the judgment must be *reversed*, and the cause remanded for further proceedings consistent with this opinion.

Stubblefield, for appellant.

Anderson & Johnston, for appellee.

JAMES LOUDER v. W. F. McDONNELL.

Appeal and Error—Jurisdiction—Answer Without Objection.

The appellant answered both the original and cross-petition of the appellee without objection to the jurisdiction of the court, but failed to answer the amended cross-petition.

Held, that the objection taken for the first time in the Court of Appeals, that the Circuit Court had no jurisdiction to render the judgment, cannot be sustained.

APPEAL FROM LEWIS CIRCUIT COURT.

January 4, 1871.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellant answered both the original petition and cross petition of the appellee without objection to the jurisdiction of the court; and being thus before the court and having failed to answer the amended cross-petition, alleging his indebtedness to Anderson for part of the consideration of his purchase of the land, or the bond of Branon, the objection taken for the first time in this court, that the circuit court had not jurisdiction to render the judgment cannot be sustained. Nor did the court err in treating the averments of the amended cross petition as confessed by the failure to answer them—the appellant being before the court as a party to the action and in the pleadings, and not merely as a garnishee by service of an order of attachment. Nor do we perceive any error in the refusal of the court to vacate the judgment for the amount alleged to be due from the appellant to Anderson. Wherefore the judgment is *affirmed*.

Throop, for appellant.

Scott, for appellee.

W. U. CHELF v. J. W. AUSTIN & AVERILL.**False Imprisonment—Inviting Arrest and Courting Imprisonment—Peremptory Instruction.**

In an action for false imprisonment, where the plaintiff's own evidence shows that he invited the arrest and courted the imprisonment, it is not error to give a peremptory instruction for the defendant.

APPEAL FROM MARION CIRCUIT COURT.

January 12, 1871.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The evidence produced by the appellant to the jury wholly failed to establish express malice upon the part of either of the

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appellees. There is nothing in the case conducing to show that they acted corruptly, or with any intention of violating or disregarding the rights of said appellant. It may be admitted that the proceedings culminating in the arrest and imprisonment of Chelf were irregular, and possibly that the judgment imposing the fine against him was void. But his own evidence shows that he invited the arrest and courted the imprisonment of which he now complains. In the entire transaction he seems to have been equally as anxious to bring about an unauthorized arrest and imprisonment of himself, as the appellees were to discharge what they conceived to be duties imposed upon them by the law. We are of opinion that the peremptory instruction to the jury to find for appellees was proper.

Judgment *affirmed*.

J. D. Belden, appellant.

Russell & A., for appellee.

H. C. THOMAS ADMR., ET AL v. SQUIRE TURNER.

Judicial Sales—Definite Pleadings or Evidence of Title in Defendant.

It is erroneous to order the sale of land without either definite pleading for that purpose or such evidence of title as was reasonably necessary to assure the purchaser and to enable the commissioner to sell and the court to convey the title.

APPEAL FROM MADISON CIRCUIT COURT.

January 14, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

Neither the pleadings nor the evidence, as copied in the record, authorized the judgment sought to be reversed. The amended petition, alleges that "ample equitable assets" came to the hands of the defendants as the representatives and heirs of the deceased

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obligors in the notes, to pay the debts, liable to be specifically subjected, and although the judgment assumes that Henry C. Thomas and Marcus L. Thomas had not only the equitable, but the legal title to certain lands in Estill county, as devisees of H. H. Thomas, deceased, which ascended to their heirs, and orders a commissioner to ascertain the quantities and boundaries of these lands, and sell them and although in this court an argument is made by the court on both sides as to the construction of said H. H. Thomas' will, it is not in the record, nor is there any evidence of title in the defendant to the land adjudged to be sold, or that which seems to have been sold under the judgment. Whether or not the court have jurisdiction in this case to order a sale of the land in Estill county, or render a judgment against the heirs of said decedents upon the service of process in Estill, we need not now decide; for obvious reasons it was erroneous and prejudicial to appellant to order the sale without either definite pleading for that purpose or such evidence of title to be assured to purchasers, as was reasonably necessary to enable the commissioner to sell without a sacrifice of the right of the defendants, and the court to convey the title.

Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Burnam, for appellant.

Turner, for appellee.

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MARY A. D. WOOD *v.* KINKEAD & SWEATNAM, ET AL.

Judgment by Default—Defendant Constructively Summoned—Petition—Proof of Allegations—Affidavit of Plaintiff.

The allegations of a petition against a defendant constructively summoned, and who has failed to appear, cannot be taken as true, unless the plaintiff files, with his petition, his own affidavit, stating that the allegations are true and known to be so by the defendant and that they cannot be proven otherwise than by his answer.

APPEAL FROM M'CRACKEN CIRCUIT COURT. C. P. DIV.

January 10, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

On the 14th of February, 1867, William Wood conveyed his estate, both real and personal, in McCracken county to Philip Nunn in trust for the payment of his debts, setting forth the names of the creditors and the amounts of their respective debts to be secured, and among the creditors named is Mary A. D. Wood, his sister, whose debt he states to be about \$3,000.

The trustee having failed to sell the trust estate, or to pay the debts of Wood, and to execute the requisite bond under the statute, this suit in equity was instituted by Kinkead and Sweatnam, two of the creditors named in the deed, to compel the execution of the trust, and for general relief.

In their original petition they say "they are informed and so charge that the *debts* of Mary A. D. Wood and Philip Nunn have been fully paid off and discharged; but do not know, plaintiffs ask that each of the defendants be required to answer this petition, and say how much each has been paid" and in that petition there is no other allegation against Mary A. D. Wood who was proceeded against as a non-resident defendant.

In an amended petition filed the 30th of April, 1869, the plaintiffs below allege, that Nunn the trustee had never executed the bond required by law, and ask that all his acts as such may be, for that reason, adjudged null and void, that Mary A. D. Wood

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is a non-resident of the State, that Wood the grantor, after the institution of this suit, and after the service of the summons on him had conveyed to one Henry Stanley a large portion, if not all of the trust property and exhibit the deed to him therefor, and conclude with a prayer that the conveyance to Mary A. D. Wood by Wood & Nunn, and the deed to Stanley by Wood, be annulled, and set aside, for a sale of all the trust property, and that the proceeds arising therefrom be applied to discharge "the *honest* and *proper* debts of defendant Wood" and for all general and special relief.

Another amended petition was filed in October, 1869, but in it the plaintiffs only charge that Nunn had received of trust funds, and specified amounts, and pray that he be compelled to pay the same into court. A warning order was taken against Mary A. D. Wood and Stanley and an attorney appointed to defend for them, but he never made a report in the case.

With no other allegation against Mary A. D. Wood, and without any evidence against her, the cause was submitted, and the court adjudged that the deed of conveyance from William Wood, and Philip Nunn assignee of William Wood to Mary A. D. Wood of Herkimer county, New York, of date the 24th of April, 1867, be set aside as fraudulent and void as to the creditors of William Wood in this suit, and that is the first time the deed referred is mentioned, and after rendering judgment in favor of the creditors of Wm. Wood named in the deed of trust, except Byers & Co., whose debt was adjudged to have been paid, and adjudging that King was entitled by assignment of the debt owing to How, and postponing the claim of Stanley until said judgments should be satisfied; it was adjudged that the debt named in the deed of assignment as a debt to M. A. D. Wood for about \$3000 was not valid, never existed in fact, and was then disallowed. The trustee's report was confirmed, and a sale of so much of the real estate embraced in the deed, as should be necessary to pay the debts therein adjudged to be owing and the costs of the suit, was ordered, and from that judgment Mary A. D. Wood has appealed.

It is manifest from an inspection of the original and amended petitions, that there is not an allegation of fraud either against appellant or William Wood in relation to her claim, that it was unfounded, did not exist, nor that it had been paid, and without

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some such allegation the judgment was wholly unauthorized, and could not be sustained. But even if the necessary averments had been made, still as appellant was only constructively summoned, and did not appear to the action, they could not have authorized a judgment against her without proof.

Sec. 439, Civil Code provides that the statements of the petition as against defendant constructively summoned and who has not appeared, except such as are for his benefit, shall not be taken as true, but are to be established by proof.

But where the plaintiff files with his petition, his own affidavit, stating that any of the allegations thereof recited in the affidavit are true and known to be so by the defendant, and that they cannot be proved, or shown otherwise than by his answer, so far as affiant knows or believes, such allegations unless denied by the answer shall be taken as true.

As there was no proof offered against appellant's claim, and no affidavit filed with the petition, as prescribed by this section, the judgment was on that account as against appellant, erroneous even if the petitions or either of them had contained the necessary allegations. Wherefore, the judgment is *reversed*, and the cause remanded, with directions to adjudge to appellant the debt named in the deed as due her, and upon the sale of the trust property that the same be paid, or if there should not be enough to pay all the creditors that she have her *pro rata* after paying the costs of the suit.

L. D. Husbands, for appellant.

Bramblett & Durnett, for appellee.

ANDREW J. THOMAS v. ELIZABETH THOMAS.**Husband and Wife—Custody of Child.**

Where the husband and wife are both of a good moral character and the child is of tender age, a judgment committing it to the custody of the mother will not be disturbed on appeal.

APPEAL FROM ROWAN CIRCUIT COURT.

January 10, 1871.

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OPINION OF THE COURT BY JUDGE HARDIN:

Although the preponderance of the evidence conduces to show the appellant to be a man of moral worth and good character, and not objectionable, as a proper person to have the care and curation of his child, and more than the appellee, who is also shown to be competent and worthy to have the custody of the child, we are constrained, in view of the sex and age of the child, and the unquestioned good character of the mother, to approve the judgment committing the child to her. We do not regard the judgment as conclusive of the authority of the court, hereafter to commit the child to its father's care when its age and other circumstances may render it proper according to principles heretofore settled by this court. But whether such action will or not become proper will depend on facts and circumstances, yet, to some extent, to be developed.

Wherefore, the judgment is *affirmed*.

Stone, Hargis, for appellant.

Phister, for appellee.

TOBIAS LOGAN v. WILLIAM LOGAN ET AL.**Bailment—Loan of Horse—Condition of Bailment—Negligence.**

Appellant loaned the appellee his horse on the condition that they were not to take him beyond Greenupburg, which agreement they violated and the horse was killed. Held, that appellees were responsible for the value of the horse, although the death was not the result of carelessness or negligence upon their part.

APPEAL FROM ROWAN CIRCUIT COURT.

January 5, 1871.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Without intending to indicate an opinion as to the preponder-

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ance of the evidence upon either of the propositions to be noticed, we think *from* the evidence that the jury might have rationally inferred that the appellees were the joint bailees of the appellant's horse, and therefore jointly responsible to him for the consequences of any violation of the conditions of their bailment. Further, that the condition upon which the horse was loaned was that he was to be taken no further than Greenupburg; also that he was taken beyond that point with the assent and at the instance of the appellees. If their propositions be true, they are responsible for the value of the horse, although the death was not the result of carelessness or negligence upon their part.

We think the court erred in its peremptory instruction to the jury to find for the appellees. Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Hargis, for appellant.

Phister, for appellees.

DANIEL McALLISTER'S ADMR. *v.* COMMONWEALTH.

Appeal and Error—Error in Original Judgment Cannot be Corrected on Second Appeal.

The Court of Appeals has no power, on a second appeal, to correct an error in the original judgment which either was, or might have been relied upon in the first appeal.

APPEAL FROM JEFFERSON COUNTY COURT.

January 7, 1871.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The action of the county court of Jefferson county in the assessment for taxation of the property of the estate of Daniel

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McAllister deceased has heretofore been before this court for revision.

Said action was then reversed and the proceeding remanded to said court for the correction of two errors specifically set out in the opinion of this court.

These errors have been corrected, and the case is now before us by an appeal prosecuted to correct an error in the original judgment which either was, or might have been relied upon in the first appeal.

It is now too late for this court to reverse the action of the county court in assessing triple taxation upon the property of the appellant even if it admitted that such assessment was erroneous. The first judgment of the county court was in effect affirmed by this court except as to the errors pointed out, and it is not in our power at this time to disregard or set aside that affirmance.

Judgment *affirmed*.

Harrison, for appellant.

Pope, Camp, for appellee.

JAMES A. COOK v. BRADFORD F. CANTRILL.

Trial—Conflicting Evidence—Preponderance—Second Verdict.

Although conflicting evidence may, when carefully scrutinized, preponderate against it, a second verdict will not be set aside on that account.

APPEAL FROM CALDWELL CIRCUIT COURT.

January 11, 1871.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Even though the intrinsic probabilities, deducible from the conflicting evidence, may, when carefully scrutinized, preponderate against the verdict, yet there is some strong testimony to sustain it.

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In such a case, whatever we might have done as jurors, we cannot consistently or safely set aside the second verdict for the appellee by a jury acquainted with the parties and the witnesses.

Wherefore the judgment is *affirmed*.

Marble, for appellant.

Hewlett, for appellee.

E. S. PRYOR *v.* COMMONWEALTH, FOR LINDSEY.

Clerks of Courts—Wrongful Issuance of Execution—Liability—Measure of Damages.

The appellant as clerk issued a second execution on a judgment, at the instance of another party, notwithstanding the first one had been returned satisfied, as shown by the records of his office, held, that where it is not shown that the clerk acted corruptly, he is only liable for the actual damages sustained by reason of his wrongful act.

Same.

The party who procured the execution to issue, and who received the amount collected is primarily responsible; but if he is insolvent the clerk is liable for the entire amount improperly collected.

APPEAL FROM HENRY CIRCUIT COURT.

January 6, 1871.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Robinson recovered a judgment against the appellee, J. S. Lindsey, for a balance on a debt amounting, with interests and costs, to about one hundred and ten dollars. Lindsey by his petition, claims that execution issued on said judgment sometime during the year 1863, and that he paid off and satisfied the same, and took the sheriff's receipt therefor. That afterwards another execution was issued on the same judgment and placed in the hands of Berryman, a deputy sheriff which was paid off and satis-

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fied without his knowledge by his brother and agent, who resided in Henry county. The appellee being at the time a resident of Bourbon county, this execution he alleges was returned satisfied.

He charges that after all this the defendant Pryor who was the clerk of Henry Circuit Court issued a third execution on this judgment, and sent the same to the sheriff of Bourbon county, and that he was compelled to pay said execution and thereby satisfy the judgment the third time. He alleges that he had lost the receipt of the sheriff to whom he had paid the amount of the first execution, and that he was at the time ignorant of the fact that his brother had previously paid off and satisfied the second.

This action was brought against Pryor upon his official bond to recover the amount last paid, Lindsey claiming that he violated the conditions of his said bond by issuing the last execution.

Pryor answered denying all liability. The evidence substantially sustained all the allegations of Lindsey's petition, but it was shown by Pryor, that the father and administrator of the deputy sheriff Berryman, claimed that the execution returned satisfied by his son, had not in fact been paid by Lindsey or his agent but by the deputy himself to the plaintiff, and that by reason thereof he as administrator of his said son, was the beneficial owner of the judgment, and that the last execution was issued at his instance, and under the advice of counsel.

Upon this state of facts the court instructed the jury, in effect, that if the records of his office showed that the execution in favor of Robinson v. Lindsey had been satisfied that Pryor had no right to issue the last execution, and that if the same was issued and Lindsey was compelled to pay it, the clerk and his sureties were liable for the amount so paid, with interest from the time of judgment.

By this instruction which is not modified by any other given, the liability of Pryor is made to depend upon the existence of but three facts. 1st, that the records of the clerk's office showed that the execution in favor of Robinson was paid in full. 2nd, that Pryor issued the last execution. 3rd, that Lindsey was compelled to pay the same.

The records of the office might have shown that the execution was paid, when in point of fact it was not. The return of the execution satisfied was evidence of the fact of payment, but if

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the return was a mistake, it could have been corrected by the court in a proper proceeding, and another execution issued. The clerk, it is true, had no right to disregard this return, but if he did, and Lindsey was thereby compelled to pay, a debt which in good conscience he ought to have paid and which the law would have compelled him to pay, he was not thereby damaged to the amount of the debt so paid. Again although Pryor did issue the last execution and Lindsey was thereby compelled a second time to pay the debt, it does not necessarily follow that the amount of the execution is the measure of the damages for which Pryor is responsible. It is not shown that Pryor acted corruptly, he is therefore only responsible for the actual damage Lindsey sustained by reason of his acts as clerk. As Lindsey who certainly knew that the first execution had been paid neither attempted to quash the last execution nor to enjoin its collection, we are inclined to regard the party who wrongfully procured the execution to be issued, and who received the amount collected thereon as primarily liable to him. If he is insolvent, then Pryor is liable for the entire amount improperly collected; if not, then he is only responsible for the expense incurred, and the loss sustained by Lindsey in recovering from Berryman, the amount improperly collected by him on the execution.

The instruction under consideration wholly fails to conform to this view of the law. Wherefore the judgment against Pryor is reversed and the cause remanded for further proceedings consistent with this opinion.

Webb & Barbour, for appellant.

Montfort, for appellee.

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CITY OF NEWPORT v. E. F. ABBOT, ET AL.

Municipal Corporations—Street Improvement—Subdivision for Purpose of Assessment—Equal Burden on Abutting Property.

The right of a city to levy a tax on property fronting on a street not being questioned, the town council has the right to sub-divide the street, being improved, by certain cross streets, so as to form the lot owners into a defined square or sub-division, or quasi community for the purpose of specific local taxation.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 28 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

By the 4th section of "An Act to amend the Charter and Laws of the City of Newport in Campbell county" approved February 4th, 1863, the city has power by ordinance to provide for repairing from time to time any part of the metal on any part of any street, alley, common or space, or for cleaning the same or for clearing out obstructions therefrom. And if the city shall do the work, the expense and costs thereof as audited and fixed by the city council shall be charged up to and apportioned equally upon the front foot of the lots fronting such work, on the side of the street, alley, space or common where the same shall be done and shall constitute a special tax debt against the property and owners of such lots or part of lots, for the judgment thereof with all penalties, costs and expenses incident thereto.

By an ordinance adopted July 2nd, 1868, the city council provided for the repairing of Madison street between Columbia and Hubbard streets, the entire expense of which was to be "levied and collected as a special tax at a rate per lineal foot on the part of said Madison street to be improved and the owners of property bounding thereon to pay the same."

In pursuance to said ordinance the city contracted with Adam Schweitzer for the performance of the work. "The money to be raised by a special tax at a rate per lineal foot to be levied

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and collected from the property holders along the line of the part of the street so improved, and to be paid over to the said Adam Schweitzer from time to time as fast as collected.

Afterwards upon the petitions of a large number of the property holders to be affected by the proposed repairs many of whom are parties to this action, the council provided that the property between Isabella and Patterson street should be assessed at the rate of \$1.70 per foot, that between Patterson and Hubbard streets at the rate of \$1.51 1-2 and the remainder at the rate of \$1.27 1-2 per foot.

It seems that this street was originally graded and paved at the expense of the owners of the property now about to be taxed for the repairs to be made upon the same. And that this apparent discrimination was necessary in order to proportion the assessment on the property to the improvements and repairs necessary to be made in front of the same, and that an average tax upon the property fronting upon the entire street, would impose a heavy tax upon lots in front of which little or no repairs were necessary.

The work upon two of the sub-divisions having been completed the tax was levied, and this suit was brought to enjoin its collection.

Appellees insist that the discrimination in the assessment of the tax renders it unequal, that it is therefore unauthorized, and further that the council has no power to enforce its collection until all the contemplated repairs shall have been finished. The right of the city to levy a tax upon the property fronting on Madison street for the improvement of the same is not questioned, and it seems to us that according to the principles governing the assessment of taxes for such municipal purposes as laid down in the opinions of this court in the cases of the *City of Lexington v. McQuillans Heirs*, 9th Dana, 513, and of the *City of Louisville v. Hyatt, et al*, 2nd B. Monroe, 177, the council had the right to sub-divide the street being improved by certain cross streets so as to form the lot owners into a defined square or sub-division, into a subordinate quasi community for the purpose of this specific local taxation.

And as it appears in this instance that the taxation was by reason of this sub-division more nearly apportioned to the expense each lot owner would have incurred in case he had made the

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repairs himself instead of having them made through the agency of the city government. It cannot be said that it has so operated as to impose unnecessary or improper hardships upon some at the expense of others. All the property holders of each sub-division are required to contribute alike, and we know of no means by which a perfect equality of taxation could have been more clearly approximated than by that resorted to by the appellant. Nor is this approximate equality at all disturbed by the fact that all the repairs were included in one contract. It is not alleged that a different course would have secured the work at less expense.

Having the right by this sub-division to create their subordinate communities, it follows that as the work in each sub-division is completed, the council has the right to levy and collect the tax due from the property owners within the limits of the same.

We are of opinion that the court erred in perpetually enjoining the collection of the tax assessed against the property of the appellees.

Its judgment is therefore reversed and the cause remanded for further proceedings consistent herewith.

Geisler, Hawkins, Boden, for appellant.

Hallam, for appellees.

THE EASTERN KY. RAILWAY CO. v. GREENUP COUNTY.**Railroads—Taxation for Local Purposes—General Laws.**

Railroads are not legitimate subjects of local taxation under the general laws of this state.

APPEAL FROM GREENUP CIRCUIT COURT.

January 4, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

This was a motion in the Greenup County Court by the Eastern

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Kentucky Railway Company to have the assessment of their property for the year 1870 corrected. Upon the trial of said motion it was proven that the company had, before the 10th of July, 1870, returned to the auditor the length of their road, &c., in compliance with the requirements of the act of February 20th, 1864 (*Myers Supplement*).

The motion was sustained so far as the assessment for state revenue purposes was concerned, but it was ordered that the valuation fixed on the road, road-bed, engines, fixtures, &c., viz: \$260,000 be retained on the assessor's book for the purpose of being subjected to taxation for county purposes, and from this portion of the order the railway company has appealed.

There are two acts authorizing the county of Greenup to levy an ad valorem tax, the one to be found on page 44, *Vol. 1, Acts of 1865*, the other on page 495, *Vol. 1, Acts of 1869*, but we perceive nothing in either of said acts which places this road and its fixtures upon a footing different from that of other railroads in this State.

This court in the cases of the *Louisville & Nashville Railroad Company v. Warren County Court*, 5th Bush, 244, and of *Applegate &c. v. Ernst &c.*, 3rd Bush, 648, held that railroads are not legitimate subjects of local taxation under the general laws of the State.

The legislature has not indicated in either of the acts referred to an intention to subject the property of appellants to a burden not imposed upon similar property owned by other railroad companies.

The county court erred in refusing to sustain the motion to correct the assessment as to county as well as state taxation, and for this error its action is reversed and the cause remanded with instructions to correct the assessment in the manner indicated in this opinion.

Dulin, for appellant.

Filson, for appellee.

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J. M. DENNY, ET AL v. HARRIET FURGERON, ET AL.

Vendor and Purchaser—Lien For Purchase Money—Recitals in Deed.

The recital in a deed, is that said land was sold "for the sum of \$1700.00 to be paid in hand, the receipt of which will be fully acknowledged, when the above amount is fully paid to the order of the first note."

The vendor caused his vendees to execute to Ferguron, their joint note for the sum of \$1088.44, and to Denny, the appellant their joint note for \$300.00. Denny brought this action on his note seeking a purchase money lien on the land. Held, that neither the letter nor the spirit of the statute, giving vendors a lien for purchase money on land sold, was complied with in the execution of the conveyance.

APPEAL FROM WAYNE CIRCUIT COURT.

January 6, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

Thomas D. Denny sold and conveyed a tract of land situated in Wayne county to Crabtree and Simpson for the expressed consideration of seventeen hundred dollars. The recital in the deed is that said land was sold "for the sum of seventeen hundred dollars to be paid in hand, the receipt of which will be fully acknowledged when the above amount is fully paid to the order of the first note." The vendor caused his vendees to execute to Elizabeth H. Furgeron their joint note for the sum of \$1088.44 and to J. M. Denny the appellant their joint note for \$300. The balance of the purchase price of the land was paid to the vendor in cash. No mention was made of either of these two notes in the deed.

Mrs. Furgeron having recovered a judgment at law upon her note, caused an execution to be raised thereon, and had the land levied upon and sold, at which sale she became the purchaser and she now holds the sheriff's deed to the same. J. M. Denny also recovered judgment at law on his note and his execution having been returned no property found, he brought his suit in equity claiming that there was a lien retained upon the land to

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secure the payment of the purchase price including the notes executed to himself and Mrs. Furgeron and asking to have her execution sale disregarded, and the land resold and the proceeds applied proportionately to the payment of the two notes.

The court below dismissed his petition and he has appealed to this court.

The language of the statute is "when any real estate shall hereafter be conveyed and the purchase money or any part thereof shall remain unpaid at the time of the conveyance, the grantor shall not thereby have a lien for the same unless it be *expressly* stated in the deed what part of the consideration remains unpaid." The conveyance under which the lien in this case is claimed recites that the entire purchase price was "*to be paid in hand.*"

The exact meaning of the language used may be regarded as doubtful, but it seems to us that it implies that the purchase price was to be paid upon the delivery of the deed. Construing it however more favorably to the appellant, the conveyance upon its face leaves it uncertain whether or not the entire purchase price was to be paid "*in hand*" as recited, or at some time subsequent to its execution and delivery, and therefore it cannot be said that it "was expressly stated in the deed what part of the consideration remained 'unpaid.'"

Applying to this case the doctrine laid down by this court in the case of *Chapman v. Stockwell*, 18th B. Monroe, 652, which has been repeatedly approved in subsequent cases, we are constrained to the conclusion that neither the letter nor the spirit of the statute was complied with in the execution of the conveyance under consideration, and that the same did not retain a lien upon the land conveyed to secure the judgment of either of the notes executed or before stated to the appellee and the appellant. We are of opinion that the court below did not err and its judgment is therefore *affirmed*.

Tuttle, for appellant.

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A. V. WILLIAMS v. C. BROWNFIELD.

Land—Disputed Line—Adverse Possession—Compromise—Surrender of Possession.

When two persons are claiming the possession of land to a line of doubtful location, upon agreement as to the true location of the line, each to surrender to the other whatever possession they may have had beyond the line so agreed upon.

APPEAL FROM HARDIN CIRCUIT COURT.

January 20, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought by appellant to recover from appellee a small piece of land less than two acres, designated on the plat of Kinkead by 1, 2 & 6.

On the trial in the court below a verdict and judgment were rendered against him, and his motion for a new trial having been overruled, he has appealed to this court. Wm. Martin proves that he had known the land since 1807, that he settled on it as early as 1812, and occupied and claimed it continuously till he sold it to Perry up to Funk's line, from A to D, on Kinkead's plat, and sold to that line when he sold to Perry, and that he and Williams, appellee's grantor, once had a dispute about that line, but never settled it, knew nothing about a given corner standing at figure "1." Other witnesses prove substantially the same facts. But appellee proved by Creal, a surveyor, that after Martin sold to Perry, and before he made him a deed, he came to him, living in Larue county, and told him, he wanted him to survey the land for him; that the surveyor in Hardin county had been running Funk's line, and had not agreed, and he wanted him to run it. Because he was a stranger, and as there was a dispute about Funk's west line, he wanted it surveyed, and settled. That he went, and Martin and Williams, appellee's vendor, differed as to where the corner of the Perry tract should be, and finally they agreed that he should go to a post oak tree in the line from A to P, which

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both agreed, was in the line between Williams and Martin, and run the course of John and Robert Martin's deed to Williams—N. 60 degrees W. and wherever that line crossed the line he had just before run, from the letter O in the plat that point should be the corner. That he ran it in the way agreed upon, the line thus run crossed the line from the letter O near a small gum, which he marked as a corner, to which Martin and Williams agreed, he then surveyed the Perry tract, and Martin's deed to Perry was made from his field notes of that survey. And Creal is sustained by the deed from Martin to Perry, and from Perry to appellant. Both deeds call to begin at a stake in Spratt's field in Funk's original line, running thence N. 14 degrees E. 180 poles to a *gum* corner to Daniel Williams. If it be conceded that Martin claimed the land up to A on the plat, and held the possession thereof continuously up to the time he conveyed to Perry, appellant acquired title to the land beyond that corner. If Martin had the possession of the land prior to the date of the survey made by Creal there is evidence conducing to show that he surrendered the possession up to the gum corner to Williams, and by his conveyance to Perry limited him to that corner, and Perry's deed to appellant calls for the same corner. So that appellant had neither possessory, nor paper title to the land claimed in this action. Wherefore the judgment must be *affirmed*.

Read, for appellant.

S. M. DONNELL v. WILLIAM E. KNOX, ET AL.

Animals—Sheep Killed by Dogs—Action For Damages—Petition.

In an action for damages for sheep killed by dogs the petition must allege that the owner of the dogs had received the notice required by the statute, or that his dogs had killed and wounded sheep before.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 5, 1871.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE LINDSAY:

The 3rd section of the Act of January 31st, 1865, provided "That every person owning, having or keeping any dogs, shall be liable to the party injured for all damages done by such dog." By an Act approved March 9th, 1868, this Statute was so amended as to provide that the person owning, having or keeping "dogs by which sheep are killed or injured, shall *not* be liable to the party injured for damages, unless he shall have received previous notice that his dog or dogs have killed or wounded sheep."

The sheep, for the value of which this action was brought, were killed after the passage of this last act. The petition does not allege and the proof wholly failed to show that either one of the owners of the dogs had received the notice required, or that their dogs had ever killed or wounded sheep before the occasion complained of. The peremptory instruction by the court to the jury to find for the defendant was warranted by the appellant's proof.

Judgment *affirmed*.

Ross, for appellant.

Phister, Hargis, for appellee.

JAMES MONTGOMERY v. JOHN S. STAPP.**Vendor and Purchaser—Improvements—Married Woman's Title Bond.**

Where improvements are made on land under a title bond which is void, the assessments should be made only to ameliorate and not for costs of them, and the material used from land should be deducted, and any improvement made after notice to stop should be dis-allowed.

Same.

A married woman's title bond is void, consequently there is no enforceable lien on her land therefor.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 21, 1871.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The judgment in this case will be reversed for the following reasons:

1. For improvements the appellee is entitled only to ameliorations. And the assessment seems to have been made for the cost of them. And moreover the material used from the land ought to be deducted, and any improvement made after Mrs. Montgomery gave notice to stop should be disallowed.

2. As Mrs. Montgomery was covert when she signed the bond for a title the contract was void, consequently, there was no enforceable lien on her land. The decree for selling her land was therefore unauthorized. The appellee must look to her husband alone for reimbursement or reparation.

Wherefore the judgment for the sale of the land is reversed and the cause remanded for proceedings against the husband alone.

John W. Lewis, for appellant.

Hays, for appellee.

SAMUEL DUNCAN'S ADMR. v. AMANDA JENKINS, ET AL.

Guardian and Ward—New Bond Releases Surety in Existing Bond—Accumulative Surety.

Where a guardian is allowed upon his own motion in the county court to execute a new bond for the express purpose of releasing from liability his surety upon his original bond, and the new bond is executed, approved and accepted by the court, the former surety of all liability whatever, and the new bond is not accumulative surety.

APPEAL FROM MARSHALL CIRCUIT COURT. C. P. DIV.

January 6, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

This court by its decision in the case of *Watts v. Pettit's Heirs*.

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1st Bush, 155, clearly recognizes the power of the county court under the provisions of the Act of March 10th, 1856, *1st Vol. Stanton's R. S., 581*, by requiring new bonds from statutory guardians to release the surety or sureties upon existing bonds from all liability on account of the same.

In this case the guardian of the appellees upon his own motion was allowed to execute a new bond for the express purpose of releasing Duncan from liability as his surety upon his original bond.

A new bond was executed and approved and accepted by the court and it is recited in the order itself, "That Samuel Duncan can be and he is hereby forever released from any further liability as one of the sureties in said bond."

The language of the statute is that "When the security of a guardian wished to be released as such, he shall apply to the county court," &c., and it is insisted that because of the fact that in this case the application was made by the guardian and not by the surety, that it does not come within the provisions of the statute and that Duncan's representative cannot claim that his intestate was absolutely released from liability, but only that the new bond was cumulative in its legal effect. We think that it may be safely assumed that the guardian made the application because of the fact that his surety Duncan wished to be released, and this fact of itself brings this case clearly within the reason of the statute.

We are of opinion that the appellants exceptions should have been sustained as to the claim of the appellees, and the action of the court below is reversed and the cause remanded for further proceedings consistent with this opinion.

Palmer, for appellant.

Gilbert & Johnston, for appellee.

Opinion of the Court.

J. D. & J. L. FANNIN *v.* C. P. SMALLDRIDGE.

Ejectment—Wills, Powers of Attorney and Title Bond Admissible as Evidence.

In an action of ejectment, wills, powers of attorney and title bonds are admissible as evidence for the purpose of showing that the party offering them claimed under those to whom the land in controversy was patented.

APPEAL FROM BOYD CIRCUIT COURT.

January 7, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

From the evidence in this case it appears that the tract of one hundred and thirty acres of land surveyed by Fannin is within the limits of the grant from the State of Virginia to Taylor. It is also sure as a matter of law that Smalldridge was at the time of Fannin's survey in actual possession of the two hundred and four acres he claims to have bought from Taylor's representative.

These facts are substantially set out in the caveat filed in the register's office by Smalldridge.

The paper title upon which Smalldridge relies would perhaps be insufficient to establish his right as against Taylor's heirs, but the copy of the will, the power of attorney to appellee and the title bond of appellee's agent, were admissible as evidence for the purpose of showing that Smalldridge claimed under the party to whom the land in controversy was patented.

The instructions of the court were not erroneous considering the evidence in the case.

There is nothing in this record to show whether or not Smalldridge filed a copy of the caveat with the clerk of the Carter county court within fifteen days from the time it was entered. The certificate of the register is not dated, but as this point was not relied upon in the court below, it cannot be made available in this court. Judgment *affirmed*.

Dulin, for appellant.

Ireland, Moore, for appellee.

Opinion of the Court.

ELI CURRENT & HIBLER v. O. V. TALBOTT, ET AL.

**Partnership—Services Voluntarily Rendered by Partner—Compensation—
General Rule—Exception.**

When there is no agreement between the parties, what either of them are to receive as compensation for their services, it is a general rule, that in such cases neither partner will be entitled to any such compensation for services voluntarily rendered by him in the partnership business, that there are exceptions to this general rule is true, but to bring a case within any such exceptions, there must be some very special and particular state of facts.

APPEAL FROM BOURBON CIRCUIT COURT.

January 4, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The appellants Current and Hibler who are the successors and entitled to the interest of Thompson in the assets and profits of the hotel business conducted by the firm composed of Redmon, Talbott and Thompson, complain that the court below in the settlement of said partnership, erred to their prejudice by allowing Talbott \$2000, and Mrs. Redmon \$550 as special compensation for services rendered by each of them in the management and superintendence of the firm business, and this error this court is called upon to correct.

There was no agreement between the parties that either of them were to receive compensation for thir services, however valuable they might prove to the firm, and it is a general rule, as fixed as it is just, that in such cases neither partner will be entitled to any such compensation for services voluntarily rendered by him in the partnership business, that there are exceptions to this general rule is true, but to bring a case within any such exception there must be "some very special and peculiar state of facts," *Lee v. Lachbrooke*, 8th Dana, 214. Generally, the circumstances must warrant the conclusion that the partner claiming the special compensation had been re-elected by the firm as its agent, and entrusted with the sole management of its business, as in the case

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of *Bradford v. Kimberly*, 3rd Johnson, Ch. Reports, 431, in such cases the law will imply an agreement upon the part of the other partners to pay a reasonable compensassation for the services of their agent, although he was their partner.

There may be other cases in which a portion of the partners so far neglect to perform their duty as to amount to a breach of good faith, and in which the services of the business partner so far exceed in value those of the others that it would be unconscientious to refuse him some compensation at the hands of those who had profited by his devotion to business in spite of their neglect, and bad faith. But even in such cases compensation could only be given upon the idea that there was an implied contract upon the part of the members in default to pay for the extraordinary services rendered.

It does not seem to us that either Talbott or Mrs. Redmon bring themselves within either of these exceptions. Neither of them devoted the whole of their time to the managment of the business of the firm. They both boarded their families at the hotel without accounting in the settlement for their board. The business of the hotel was to a very great degree entrusted to the management of the clerk, bar-keeper steward and house-keeper employed and paid by the firm. And it is also in proof that the books of the livery stable owned by them and in which Thompson had no interest, were kept by the clerk of the hotel. Again no claim was set up by either of them for compensation for their services until after the institution of this suit by the appellants asking for a settlement of the partnership business. Considering all the facts developed by the record, we are inclined to the opinion that the court erred in allowing the claims of Talbott and Mrs. Redmon, and to the extent of the same the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

Davis, for appellant.

Hanson & Hanson, for appellee.

Opinion of the Court.

NEWPORT STREET RAILWAY CO., v. JANE CRUMBY.

Negligence—Action For Damages—Street Railway—Compromise—Notes For Damages—Power to Issue—Ratification by Stockholders.

The appellee brought an action against the appellant for injuries sustained on its street railway. The agent and superintendent compromised the suit and issued the company's notes for the amount of damages agreed upon. The stock-holders of appellant ratified the acts of the superintendent in settling the suit and issuing notes to appellee for the amount of damages agreed upon.

In this action on the notes the appellant contends that there is no consideration for the notes and that they were issued without the authority of the company.

Held, that the settlement of the damage suit is a good consideration for the notes and the ratification of the superintendent's acts in the premises, though informal, was sufficient to bind the company.

Incompetent Evidence—Failure to Object.

Whether the evidence to prove the issue was competent is a question not before us as it was admitted without objection.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 25, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

From the evidence which was not objected to it appears that Robbins who executed the notes was the agent and superintendent of the business of appellant generally, that he was one of the board of directors of appellant and owned a majority of the stock in the corporation, and Fisk proves after the notes had been executed, he informed Morton and Kellogg two more of the board of directors of the fact and they approved it, making a majority of the directors and of the stock of appellant who approved the compromise of the suit of appellee against the Covington Railway Co. in which appellant was interested, and by which said suit was dismissed. He also proved that prior to the commencement of this suit the superintendent executed notes for the company, but since then the board of directors has made an order to the effect that he should not thereafter execute notes to bind the company.

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And he furthermore proved that he regarded Robbins as in fact the Newport Street Railway Co. as he owned a large majority of the stock, and run the concern.

On the other hand Robbins proved that he had no authority to execute the notes, nor to bind the company, and when they were executed he so informed Mr. Fisk, and told him the president of the board of directors was absent; but that he replied it would be right he supposed; but he does not deny the fact as proved by Fisk that the track being repaired, and where the accident happened by which appellee was very dangerously injured was owned by appellant and the Covington Street Railway Company jointly, and was equally liable, that company paying the same amount for the compromise that appellant gave its notes for, nor that he did not own a majority of the stock, nor that a majority of its directors approved the compromise with appellee though informally.

The question of authority in Robbins to execute the notes was for one of fact, which was submitted to the jury who tried the case under instructions from the court to which we perceive no valid objections. Whether the evidence to prove the issue was competent is a question not before us, as it was admitted without objection.

The consideration on which the notes is founded is ample. The dismissal of a suit by appellee, in which the facts show she had a valid cause of action.

Wherefore the judgment is *affirmed*.

Carlisle, Webster, for appellant.

Hawkins, for appellee.

Opinion of the Court.

JOHN P. NUNNELLY v. B. C. ZACHARY, ET AL.

Bills and Notes—Dishonor—Suit by Last Indorser Against the Drawer and the Indorser Who Preceded Him on the Bill—Sufficiency of Petition.

A petition which fails to allege that the drawer and indorser were notified of the protest is bad on demurrer.

New Trial—Newly Discovered Evidence—Due Diligence.

The appellant stated in his affidavit in support of his motion for a new trial that since the trial, he had discovered evidence that the defendants had notice of the protest of the bill in due time, that he did not know of this evidence and could not have discovered it before the trial. Held, that while appellant states he used due diligence to discover the evidence, the facts show no diligence whatever was used by him, and his motion for a new trial should have been overruled.

APPEAL FROM PULASKI CIRCUIT COURT.

January 19, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

This case was twice tried in the court below. On the first trial a special judge was selected by agreement of the parties, and the law and facts submitted to him, after hearing the evidence he rendered a judgment for appellees. Appellant then moved for a new trial on two grounds. *First*, because the court erred in rendering judgment for the defendants. *Second*, because since the trial he has discovered testimony material to the issue which he could not procure by reasonable diligence. On these grounds a new trial was awarded to appellant, which was objected to by appellees, and a history of that trial is incorporated in a bill of exceptions, and forms a part of the record. In the new trial a special judge was again selected by the parties, the judge of the circuit having declined to sit, and the issue of fact made by the pleadings submitted to a jury. In that trial appellant was unsuccessful and he has appealed to this court.

The action was brought by appellant the last indorser of a bill of exchange for \$2500 drawn by B. C. Zachary on A. S. Gilmore payable to the order of C. W. Richardson at the Bank of New

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Orleans five months after date, accepted by Gilmore and endorsed by said Richardson, C. A. Zachary and appellant. And thus endorsed sold to the Farmers Bank, or rather to its branch at Somerset. The bill was protested for non-payment, and this action was brought by appellant against the drawer and the indorser who preceded him on the bill to recover from them the amount which he alleges he had been compelled to pay on said bill.

In his original petition he alleges the bill was regularly protested but fails to allege that the drawer and indorsers were notified of the protest, and went to trial without such allegation.

In support of his motion for a new trial he offered his own affidavit, and that of E. Milton. In his own he states that since the trial he had discovered that he can prove by C. Milton that he delivered to each of the defendants notice of the protest of said bill of exchange in due time, that he did not know when he went into the trial, or during its progress that he could prove the facts by Milton or any one else; that he had used due diligence to discover that evidence, but failed to do it till after the trial, and Milton in his affidavit states that he has no doubt he delivered notices of the dishonor of the bill to the parties thereto, as he was the cashier of the bank, and it was his habit to notify parties in such cases.

But it appears that Mr. Milton was examined as a witness on that trial by appellant, and he was not asked as to that point, and it does not appear that he was ever applied to before the trial by appellant, or any one for him to know what he would prove on that subject. So that while appellant states he used due diligence to discover the evidence the facts show no diligence whatever was used by him. And that ground for a new trial totally failed. Nor was there any reason for a new trial made out otherwise.

The motion therefore should have been overruled and as the second trial resulted favorable for appellees, and they were entitled to a judgment on the first trial, even if an error was committed on the second trial to the prejudice of appellant he is not entitled to a reversal because a judgment against him in the same action had been improperly set aside.

Wherefore the judgment is *affirmed*.

Scott, for appellant.

James, for appellee.

Opinion of the Court.

MARY F. FRANCIS v. FOUNTAIN RICE, ET AL.

Husband and Wife—Second Husband—Wife's Dower in First Husband's Land—Sale of Dower—Conversion of Money by Second Husband.

Appellant had before her second marriage sold her dower interest in the lands of her first husband, and converted it into money, and her husband possessed himself of the money by her consent after his marriage, and it, therefore, became his and his legal right to it when reduced to possession, was perfect.

Same—Statute of Frauds—Resulting Trust—Parole Evidence.

After the second husband possessed himself of his wife's money he purchased other land with it and took the deed to himself, and it recited that he paid the consideration, showing that he had appropriated the money and made the purchase to his own account. Held, that after the contract was thus completed and acquiesced in for more than twenty years, parole proof of admission by the husband that he had purchased the land for his wife, and to set up a resulting trust is inadmissible. Such evidence is inconsistent with the deed, and if permitted to prevail would be to violate the statute of frauds.

APPEAL FROM MADISON CIRCUIT COURT.

January 24, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

Appellant claims the land conveyed by Octavious Goodloe to her late husband, insisting that it was paid for with her money, and the deed having been made to her husband, Thomas K. Francis, a trust resulted to her for said land.

The first question to be considered is, did Mrs. Francis pay for the land? To answer that question, it becomes necessary to examine the evidence. At the time of her marriage with T. K. Francis, she was the widow of T. Kennedy, deceased, and as such entitled to dower in certain lands in Garrard county, owned by said Kennedy. Rice Wood proves that while she was a widow he purchased her dower right in the lands in Garrard county owned by her deceased husband by a written contract, for which he agreed to give her \$6,000. After her marriage with Francis

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he deposited the greater part of the money in his own name in the Richmond Branch of the Northern Bank. Very soon after the money was deposited, appellant having married Francis, came with him to the bank, bringing Shackelford, the clerk of the Madison county court, with them, and executed and acknowledged a deed to him for her dower interested in said land. And he gave to her husband, said Thomas K. Francis, a check for \$5,850 of the money, he had deposited in said branch bank, retaining \$150 on account of some difficulty about four acres of the land. That difficulty was settled by permitting him to retain \$38 or \$40 out of the purchase price, and the residue of the \$150 kept back at first, he paid over to T. K. Francis.

Silas T. Green proves that in 1846 he was clerk of the Richmond branch of the Northern Bank, that a few days before the 8th of January 1846, Rice Wood deposited in said branch bank \$5,850, which sum Thomas K. Francis drew on the last named day on the check of Wood, and had the same placed to his own credit. On the 20th of January 1846 said Francis gave a check payable to Oct. Goodloe for \$5,950. The facts stated, he says are shown by the books of the bank. Francis had other money than that paid by Wood, at the time deposited in the bank, and paid Goodloe more than he received from Wood, and on the 12th of January, 1846 he paid to John B. Francis \$6,000 by a check on said bank.

Appellant had before her second marriage sold her dower interest in the lands of her first husband, and converted it into money, and Francis her second husband possessed himself of the money by her consent, after his marriage, and it thereby became his, and his legal right to it when reduced to possession was perfect, and after that was done, it could not have been interfered with, even by a court of equity to force a settlement on the wife if she had sought it.

The foundation of appellant's claim is that she paid the money for the land, or that it was her money when it was converted into land; if she fails to show that, her claim must fail. Her husband could certainly have waived his right to the money received from Wood, and permitted her to have retained and used it, or to have invested it to her own use; but there is no sufficient evidence of such waiver, or surrender of his right. He purchased the land from Goodloe, and conceding that the money paid for it, was the same received from Wood, still he took the

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deed to himself, and it recites that he paid the consideration showing that he had appropriated the money, and made the purchase on his own account and for himself. After the contract was thus completed, and acquiesced in for more than twenty years parol proof of admission by the husband that he purchased the land for his wife, and to set up a resulting trust is inadmissible. Such evidence is inconsistent with the deed, and if permitted to prevail, would be to violate the statute of frauds and perjuries, and greatly to endanger title to real estate, although resting upon deeds executed, and authenticated in the manner prescribed by law. We therefore approve the judgment of the court below in refusing appellant the land conveyed to intestate by O. Goodloe, and adjudging her dower in the whole of the land described in the pleadings.

As the posthumous child took an interest in the land by descent from the father, and died in *infancy*, his mother, and half sister on the mother's side took no part of his share of the land, but on his death it passed to his brothers and sisters of the whole blood. *Sec. 9, Chap. 30, 1 Vol., R. S. pp. 421-2.*

Wherefore the judgment is *affirmed*.

Turner & W. B. Smith, for appellant.

Burnam, for appellee.

Opinion of the Court.

J. K. & A. FUNK v. MARTIN MANNISTER.

**Husband and Wife—Action for Necessaries Furnished at Wife's Instance—
Answer.**

The denial that the alleged necessities were furnished at the wife's instance, were or on her credit, is sufficient to bar the action for subjecting her estate, even if she authorized the signature of her name to the note.

Same—Non est Factum.

The answer imports a plea of non est factum, the averment that her name was signed by the husband in her absence impliedly negatives his authority.

APPEAL FROM MARION CIRCUIT COURT.

January 11, 1871.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The denial that the alleged necessities were furnished at the wife's instance or on her credit, is sufficient to bar the action for subjecting her estate even if she authorized the signature of her name to the note, for, as hitherto adjudged, there was no statutory consideration for the note.

Moreover the answer imports a plea of *non est factum*; for, connected with other facts, the averment that her name was signed by the husband in her absence impliedly negatives his authority.

It seems to this court therefore that the circuit court erred in sustaining a demurrer to the answer.

Wherefore the judgment is reversed and the cause remanded for further proceedings.

Lisle, for appellant.

Ro & Fo, for appellee.

Opinion of the Court.

YOUNG TUCKER v. S. B. WRIGHT.

Bills and Notes—Negligence in Presenting Order—Laches.

Due diligence in protesting and presenting an order for collection is required. Where a defendant fails to show this, he is held guilty of laches.

APPEAL FROM GRAVES CIRCUIT COURT. C. P. DIV.

November 15, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

Keeling sold his land and conveyed it to Carman on the 31st of May 1864 for the price of \$1100, three hundred dollars of which were by agreement of Keeling, Carman, and Wilson who was surety of Keeling in his constable's bond to remain in Carman's hands to indemnify Wilson and Tucker, the sureties of Keeling, who held a mortgage on the land to indemnify them.

On the 25th of June, 1864, Keeling gave appellee an order on Carman for one hundred and thirty dollars and eighty-seven cents. then Carman still had the three hundred dollars in his hands to pay off liabilities of Keeling as constable, because Carman proves that it was about one month after he purchased the land that he paid over the three hundred dollars to Keeling, and the deed to Carman shows that the sale was on the 31st day of May, 1864.

It was the duty of appellee to have, with due diligence presented the order to Carman and collected the money, or had the order protested, he fails to show that he had done so. How long after the date of the order till appellee presented it does not appear, but he did not, with due diligence present it, and demand payment and the court below should have allowed a credit to appellants for the amount thereof from its date. And for that error the judgment is *reversed*, and the cause is remanded with directions to award a new trial and for further proceedings consistent with this opinion.

L. Anderson, for appellant.

W. W. Robertson, for appellee.

Opinion of the Court.

C. FITCH *v.* COMMONWEALTH FOR E. BAMBERGER & Co.

Sheriff—Failure to Return Execution—Damages—Pleadings.

The cause of action set out in the petition is the failure by the sheriff and his deputy to return the execution to the office from whence it issued, for thirty days after the return day thereof, no damage beyond the debt claimed. Held, that 30 per cent damages cannot be recovered on the allegations of the petition.

APPEAL FROM MEADE CIRCUIT COURT.

January 20, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

After the demurrer was sustained to the original petition, a supplemental petition was filed, upon another bond of the sheriff with different obligors, and the original petition was abandoned. The action was brought against the sheriff for a failure to return an execution for thirty days after the return day thereof without reasonable excuse therefor, and the court below rendered judgment for the amount of the debt interest and costs and thirty per cent. damages thereon.

This judgment cannot be sustained. It is true that the cause of action set out in the petition is the failure by the sheriff and his deputy to return the execution to the office from whence it issued, for thirty days after the return day thereof, but appellees do not claim any damages beyond the debt, interest and costs in the petition. And as they failed to apprise appellants by any averment in the petition that the 30 per cent. damages were claimed, they were not entitled to recover the same.

Wherefore the judgment is *reversed* and the cause is remanded with directions for further proceedings consistent herewith.

Walker, for appellant.

Alexander, for appellee.

Opinion of the Court.

CARRIE WOODS, ET AL v. J. B. THOMPSON, ET AL.

Trusts—Fiduciaries Entitled to Compensation.

Where a fiduciary faithfully performs the duties of a trust, and there is no want of zeal or ability, he is entitled to a reasonable compensation for the purchase and preservation of an estate of infants.

Attorney and Client—Attorney Acting in Fiducial Capacity—Fees.

An attorney, acting as a fiduciary, is entitled to a reasonable compensation for defending suits against the estate.

Same—Fiduciaries not Bound to Provide Funds to Protect the Estate.

Where a sale of infants' lands are ordered, their trustee is not bound to individually provide funds with which to better protect their interest, a selection by him of their father to purchase the estate on time, is a sufficient compliance.

Infants—Guardian ad Litem not Appointed—Waiver.

Under a sale of infants' lands, as legatees, to coerce a debt due by their ancestor, after they have come into court by a guardian of their own selection, he being their father, a natural guardian, and making defense to the action, they cannot complain of the lack of appointment by the court of a guardian ad Litem.

APPEAL FROM MERCER CIRCUIT COURT.

June 18, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

In September, 1868, J. B. Thompson, Jr., and Philip B. Thompson, Jr., filed their petition in equity in the Mercer Circuit Court against J. Thomas Woods, and alleged that previously to that time Philip B. Thompson, Sr., conveyed to said Woods a certain dwelling house, out-houses, grounds, &c., in Harrodsburg, known as the property conveyed by Geo. S. Pettibone to said Thompson in trust for Nancy Hyronemous and children, in July, 1855, for the *partial* consideration of twenty-two hundred and thirty-five dollars and forty-five cents, which said Woods undertook and promised to pay to said J. B. and P. B. Thompson, Jr., on or before the first day of September, 1868, to secure the

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payment of which a lien was reserved on said real estate, in the deed. That the money had not been paid, and they prayed for a foreclosure of their lien, and a sale of the property to pay the debt.

At the November term, 1868 of the Mercer Circuit Court, Woods answered the petition, admitting the allegations thereof, and consenting to the sale of the property, and asked that *the whole of it* might be sold.

At the same term of the court, Owen Hyronemous, Carrie Woods, Francis Hyronemous, and Lucy Hyronemous, filed their petition to be made defendants to said suit. They were made defendants and by consent their petition was taken as their answer. In which they allege that Carrie Woods, F. Hyronemous and Lucy Hyronemous are infants, and petition by H. W. Hyronemous, their father and next friend, that they are the children of Nancy Hyronemous deceased, the said Carrie Woods being the wife of said J. Thomas Woods, and charge, that they have an interest in the property sought to be sold. That the same had been sold under a judgment of said court, by the commissioner, in cases of *Mayhall, &c. v. H. W. Hyronemous*. consolidated, but that the deed from P. B. Thompson, Sr. to J. T. Woods contains some mistakes in its recitals, and which they aver are not true, that the plaintiffs in the suit did not pay for said property \$2235.44. That said Thompson purchased said property as trustee of their mother and of themselves, at the commissioner's sale, for the sum of \$1707.27, that the deed to Woods reserving a lien for the sum claimed by plaintiffs, was unauthorized, that Woods never accepted it, and had no right to do so, if he had done it, and that plaintiffs had no right to recover any more than the \$1707.27, which were paid for the property, with the interest from the date of the sale. And deny that there were any expenses attending the consolidated suits of *Mayhall* and others against H. W. Hyronemous, other than what are included in, and make up the sum of \$1707.27, and for that sum alone the property is liable; that it is worth \$7000, and was purchased by said Thompson, although in the name of Woods, for the benefit of the petitioners, they being the only children of Mrs. Nancy Hyronemous, deceased, and that no lien exists on said property any more than the sum of \$1707.97.

On the 17th of May, 1869, judgment was rendered in favor

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of the plaintiffs, for the sum claimed by them, viz: \$2235.44, with interest from the 1st of September, 1868, till paid, and costs, the lien was foreclosed and a sale of all the property adjudged, on a credit of four months. And so much of the proceeds of the sale as should be required therefore, were to be applied to the payment of the debt to the Thompsons, and the further expenses incurred by the sale. The bond of the purchaser to be taken payable to the commissioner.

The property was sold at the June county court, 1869, as the commissioner reports, and P. B. Thompson, Jr., became the purchaser at the price of \$3,500, and executed bond therefor.

At the term to which the commissioner made his report of the sale, appellants filed exceptions thereto, 8 in number.

1. That the sale was not made by the commissioner in the manner authorized by the judgment.

2. Because the report does not state "*the facts and character of the sale.*"

3. The sale was illegally, wrongfully and fraudulently made.

4. Because said property being divisible, the commissioner, before he made the sale, was directed by the attorney for the defendants, to sell only so much of said property as was necessary to pay the debt, interest and cost, which instruction he willfully and wrongfully refused to follow, but sold the whole of the property, against the protest of defendants, and it brought little more than one half of its value.

5. Because said property being divisible, the said Woods, acting for himself and for the other defendants, offered to buy and pay the debt, interest and cost for said property, less fifty feet to be laid off on the south side, the whole length of the lots. Frequently while the commissioner was selling he made said offer, and insisted that the commissioner should cry his bid, but he refused to do so, and was governed by plaintiffs, who directed him not to regard his offers.

6. Because the sale was not properly, sufficiently or legally advertised.

7. That said sale was a fraud on the rights of said defendants, and if permitted to stand will result in defrauding defendants out of their interest in said property.

8. They except to said report on the same grounds on which their motion is based to set aside and quash said sale.

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The exceptions to the report were overruled, and it was confirmed, the commissioner ordered to collect the money, pay the plaintiffs their debt, and retain the surplus, subject to the future order of the court. With this judgment appellants were dissatisfied, and the evidence heard on the trial of their exceptions to the report of the sale was embodied in a bill of exceptions, which was allowed and enrolled.

They then gave notice to the purchaser of the property of their intention to move the court at its July term, 1869, to quash said sale on grounds stated in their notice. And also notified them, and P. B. Thompson, Sr., of their intention to move said court, on a named day of the term aforesaid, to set aside the judgment of sale for various reasons therein, particularly set forth.

1. Because said judgment was rendered prematurely, and before said action stood for trial, according to the provisions of the *Code*.

2. Because Carrie Woods, formerly Hyronemous, Frank Hyronemous and Lucy Hyronemous, were infants when the action was brought and were still infants, and no defense to the action was made for them, or either of them, by a guardian regularly appointed, a guardian *ad litem*, or any guardian of any kind.

3. Because of misprisions of the clerk of the Mercer Circuit Court in said action, during the progress thereof.

4. Because of other erroneous proceedings in said action against said infants "*which do not appear.*"

5. Because the court directed all of the property to be sold instead of directing a sale of only so much of it as would be necessary to pay said debt.

The reasons for quashing the sale, as set forth in the notice for that purpose, are substantially the same as those contained in the exceptions to the commissioner's report of the sale, and for setting aside the judgment; amplified however, and with the addition that during the sale Woods and Kyle, as the agent of appellants, repeatedly offered to pay the debt for the property, less fifty feet taken from the south side, the whole length of the lots, and that they were able to pay said sum, and to give bond with ample surety therefor, their sureties being present and ready to join them in executing a good bond, but that the commissioner refused to accept their offer, or to cry their bid.

All their motions were overruled, and the sale confirmed, and from these several rulings of the court appeals are prosecuted.

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First as to the sufficiency of the petition of appellees and their judgment against Woods for a sale of the property to satisfy their claim. P. B. Thompson, Sr., does not deny that he purchased for the benefit of Mrs. Hyronemous' children, and conveyed it to Woods to effectuate that purpose; but so much of that transaction is loudly complained of, as secures to said Thompson in the deed \$527.47, the difference between the amount for which he purchased it, and the consideration inserted in his deed to Woods.

His deposition is taken in the case and he explains how this difference is made up; as a faithful fiduciary it was his duty to resist the efforts of the creditors of H. W. Hyronemous to subject the property to the payment of his debts, and that he could not do without the expenditure of money, if he had employed counsel he would have had them to pay, and if he rendered the services himself, being a lawyer, and performed them skillfully and faithfully, no reason is perceived why he should not be allowed a reasonable compensation. The ancient doctrine that a fiduciary is not entitled to compensation for services rendered to his beneficiaries, does not prevail now, where they are faithful and there is no charge that there was want either of zeal or ability on the part of P. B. Thompson in the defense made by him to the actions, and the sums charged for money expended and services does not seem to be unreasonable, and no error was committed by the court below in allowing it.

P. B. Thompson, Sr., the trustee, had no trust funds in his hands, with which to pay off the debts of Mayhall and others, nor had he the means of his own, as the evidence shows to advance to pay the same, but as the sale was on a credit, and he could buy and furnish the requisite surety, he adopted that as the only plan perhaps, in his power to secure the property to the beneficiaries, and selected Woods, the husband of one of the beneficiaries and related to the others, as the person best suited to undertake the trust, the selection was altogether proper; Woods could have paid the money, as appears from the evidence, before the last sale, and if he would not do it, the Thompsons, who it seems had to borrow the money to pay the debts, were not bound to wait.

The testimony very decidedly preponderates to the conclusion that the deed was made to Woods under an arrangement between

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Thompson, Sr., and himself, that he would advance the money and hold the property, he does not deny it in his answer, nor disprove it in his testimony, and why he changed his mind is not explained. Indeed he admits the allegations of the petition in his answer thereto, and offers up but one prayer therein, and that is that "*the whole of said property be sold,*" and consents to sale on condition that it is all sold as it seems.

He, by his marriage, became the guardian of his minor wife, and assumed to act for the other beneficiaries, and if there was any wrong in the judgment which conforms to the prayer in his answer, it would seem that the responsibility should rest on him. But may there not have been a strong sensible reason for desiring that the first sale should cover the whole of the property? It had already been adjudged that it was subject to the debts of H. W. Hyronemous, it was known that it would bring, or was worth more than the amount of the judgments against him, for which it was then to be sold, and if the friends, or a friend of his children could buy it for them at said sale, it would secure it to them. Be the motive whatever it may however, the transfer of the title to Woods is not assailed successfully, and seems to have been the most judicious and prudent disposition that could have been made of the title at the time—in which he acquiesced, and the sale was made in conformity to the judgment, which was the rule for the action of the commissioner, and from it he could not depart. Nor is it perceived how appellant are prejudiced thereby. Their own witnesses prove that the fifty feet taken off the south, the length of the lots, would not, after being severed from the residue of the property, have been worth over \$200, and it would have injured the balance at least \$1000. But it is not perceived if appellants were so desirous to save the property why they did not purchase it, for it could not matter to them what they bid for the whole of it, they were, and would have been only bound to pay the debt to appellees, the balance would be theirs, so that the amount they bid, no matter how much, would not have increased the amount they would have to pay out. It is utterly impossible to show how they could have been prejudiced by the refusal to recognize their bid for a part of the property, when if they had bought it all at whatever price they may have bid, they would only been required to pay the debt of \$2235.44, for which it was sold.

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As to the objection that no guardian was appointed to defend for them. They as *actors* had come into court by a guardian of their own selection, and he their father, natural guardian, every defense was made that could have been made for them, they asked no other guardian than the one they had selected, and one for whom Mrs. Carrie Woods had exchanged her husband and legal guardian. There was no failure of defense for want of a proper guardian, and it would have seemed officious in the court to have displaced their parent and natural guardian, to have put another in his place.

Upon a review of the whole case we perceive no error prejudicial to appellants, and the judgment must therefore be *affirmed*.

Kyle, for appellants.

Thompson, for appellees.

OHIO RIVER PETROLEUM COMPANY v. JAMES D. YOUNG.

Accounts and Accounting—Payment After Acceptance Given—Application of Payments.

A was working for B, and an agreed settlement was made up to a certain date, which was closed by acceptances given by B. Afterwards A continued to work for B and payments were made him from time to time. Held, that B would not have the right to ask that the payments should be applied to the acceptances first.

APPEAL FROM LEWIS CIRCUIT COURT.

June 3, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellee, Young, brought this action on two orders drawn upon, and accepted by, the "Ohio River Petroleum Company," one of them dated August 14, 1865, for \$100, and the other dated September 28, 1865, for \$120. Both sums were due for boarding hands for the company.

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The defense was, payment of \$200 March 31, 1866, and a set-off of a claim for the rent of a house from April, 1865, till November, 1866, at four dollars per month, amounting to \$76.

By a reply the plaintiff controverted the set-off, admitting the occupancy of the house, but averring that plaintiff did so without charge, while in the appellant's service, and he further admitted the receipt of the \$200, and also subsequent payments of \$50, April, 1866, \$50 May, 1866, \$51 June, 1866 and \$10 July, 1866. But the plaintiff alleged that at the date of the payment of \$200, the company was indebted to him for work in their service at the price of two dollars per day, as well as upon the acceptances for boarding hands, and that upon a partial settlement, then made between him and the superintendent of the company, there was due to him \$349, not including his work for March, 1866; and that he continued to work at the rate afd. till the 16th of July, 1866—116 3-4 days, amounting to \$232.75, and that neither the \$200, nor any of the other payments were receipted on the acceptances but all of them were for work, barring the acceptances wholly unpaid.

The court seems to have held the plaintiff to account for rent at as high a rate as the use of the house was worth, but would not apply the admitted payments in discharge of the balance of the acceptance, holding the payments to have been made on account of work, and rendered judgment for the plaintiff for \$140, from which this appeal was taken.

The evidence conduces to the conclusion that at least the amount of the judgment was owing to Young, and although the testimony of Miles, the superintendent of the company, is in effect, that in making the payment of \$200 he believed and intended that it was to be applied in part payment of the acceptances, yet as they were not surrendered or credited, and the plaintiff may not have so understood the intention of Miles in paying the money, and elected, as he had a right to do, in the absence of a different direction at the time, to treat the payment as upon the account for work, and not upon the acceptances, we do not feel authorized to reverse the judgment of the court below upon a mere technical objection, which is not at all certainly sustained by the weight of the evidence.

Wherefore the judgment is *affirmed*.

G. M. Thomas, for appellant.

G. T. Halbert, for appellee.

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JOHN CARPENTER v. JOHN STRAIN, ET AL.

Judgment—Erroneous—Long Acquiescence.

An erroneous judgment which has never been reversed and which has been recognized for nearly twenty years will be upheld.

APPEAL FROM ALLEN CIRCUIT COURT.

January 27, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The conveyance from Richard to John Carpenter executed in September, 1845 was by the decree of a court of competent jurisdiction in a proceeding to which both the vendor and vendee were parties set aside and declared to be null and void. This decree remains unreversed and in full force and effect. A short time after its rendition about the year 1847, appellant abandoned the possession of the lands said deed purported to convey to him, and it does not satisfactorily appear that he has at any time since then, asserted claim to the same. He certainly has wholly failed to comply with his contract to take care of and provide for the grantor and his wife, which was the consideration for the conveyance. It appears too that from 1847 to 1866 when the grantor died, he continuously occupied and controlled said land, claiming it all the while as his own. While it may be possible that the decree in the case of *Hern & Others v. Carpenter*, ET AL., was erroneous, as the court may, have only intended to hold the deed void as to antecedent creditors, yet as it has never been reversed, and as it has for nearly twenty years been recognized as valid and binding both by the appellant and his father, and as the appellant during all that time wholly failed to perform his part of the contract of sale, it is too late now for him to assert claim, as against the devisees of his said father. Equity would have relieved Richard Carpenter against the claim of appellant, and his devisees occupy an attitude equally favorable. We are of opinion that the petition was properly dismissed.

Judgment *affirmed*.

Mulligan, Bates, for appellant.

Harlan & N., for appellee.

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H. GROTENKEMPER & Co. v. HILL & SMITH.**Conditional Sale—Delivery of Property With Reservation.**

Delivery of whisky to a warehouseman, with an agreement to pay 60 cents per gallon and the vendor to have half the profits over and above that sum, is held to be a conditional sale, with an equitable interest.

Same—Liability for Failure to Sell at Highest Market Price.

The assignee of an interest in whisky stored in a warehouse, is entitled to receive the benefits of the highest market rate offered for the goods, on a bona fide bid, therefor.

Same.

A warehouseman, holding goods on a conditional sale, offered whisky on hand, on October 15, for \$1.50 per gallon. Asked to send samples for inspection and, on receipt of same, the purchaser wired acceptance. The warehouseman reported a prior sale, ten days before, at \$1.20 per gallon. Held, that he was liable to the assignee of the original vendor for the difference in price of the two offers.

Factors and Brokers—Warehousemen.

In the absence of an agreement or proof as to expenses, advances, interest, etc., a warehouseman can only charge for legitimate storage, and a commission for selling.

APPEAL FROM KENTON CIRCUIT COURT.

June 2, 1870. .

OPINION OF THE COURT BY JUDGE WILLIAMS:

M. S. Dehoney, a manufacturer of whiskey at Warsaw, Kentucky, arranged with Hall & Long of Louisville, to advance him funds to carry on his business and they were to sell the whiskey, reimburse themselves, according to the stipulated terms, and pay over to him the surplus.

When Dehoney had some 154 barrels of whiskey manufactured *Hall & Long* determined to make no more advances, but required an adjustment of balances, whereupon Dehoney made an arrangement with Grotenkemper & Co., of Cincinnati, by which he was to ship the whiskey to them, or rather warehousemen in Covington,

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and transfer to them the warehouse receipt, they paying him sixty cents on the gallon and he to have half the net profits over and above that sum; according to this arrangement Grotenkemper & Co. deducted a small account against Dehoney, the costs of transporting the whiskey, and gave their acceptance at 90 days time for the remainder, \$3,400, which Dehoney at once endorsed to Hall & Long on an adjustment of their accounts; these transactions occurred in November, 1867.

Matters thus remained, with but little, if any, of the whiskey sold, until October 15, 1868, when a party representing the house of Ulman & Co., of Baltimore, authorized McDonald, who had the whiskey in store, to offer Grotenkemper & Co. \$1.25 per gallon, cash, but which they declined saying they had been offered \$1.40 per gallon and would not take less than \$1.50. This being made known to the representative of the Baltimore house he requested a sample to be sent to their house and they would telegraph him, which he accordingly did, and on the morning of October 24, received from them a telegram accepting the offer at \$1.50 per gallon, cash. McDonald immediately notified Grotenkemper & Co. who answered that they had ten days previously sold the whiskey to Boyle Miller & Co. at \$1.20 per gallon, on time, when McDonald went to them and made the same offer; before accepting it however, they sent out one of their business men and on his return accepted the offer. This was possibly to consult Grotenkemper & Co. Dehoney having sold his interest in this whiskey to Hill & Smith they sued Grotenkemper & Co. for its entire proceeds, after deducting legitimate expense for advancing, selling, &c.

But to which Grotenkemper respond with charges for advancing every 90 days, interest on the money, warehouse expenses, &c., and the sale to Boyle, Miller & Co. at \$1.20 per gallon, on October 26, 1868, and offer to adjust one half the net profits between sixty cents and \$1.20 per gallon, after deducting their said account.

The evidence certainly tends strongly to prove a conditional sale by Dehoney to Grotenkemper & Co. at sixty cents per gallon, with a reserved interest of one half the net profits over that sum.

Boyle, Miller & Co. were in laboring circumstances, having been burnt out with a large stock destroyed, not secured by insurance, and owed Grotenkemper & Co. largely over \$100,000,

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they were therefore deeply interested in keeping Boyle, Miller & Co. afloat and in profitable business; when the first proposition to purchase said whiskey was made by McDonald for Ulman & Co., Grotenkemper did not pretend the whiskey had been sold, but offered then to sell at \$1.50 per gallon, this was October 15, when notified on the 24th that Ulman & Co. would take it, their response that it had been sold ten days previously, that is on the 14th October, to Boyle, Miller & Co., cannot command confidence. especially as their answer, the note of Boyle, Miller & Co. for the whiskey and Grotenkemper & Co. bill of sale of it to them, all bear date October 26th. Wherefore the sale must be deemed to be made by Grotenkemper & Co. to Ulman & Co. for one dollar and fifty cents per gallon, cash, and they must respond to Hill & Smith for one-half of the profits at this price with interest thereon, after deducting legitimate expenses.

The transaction must be regarded as a sale by Dehoney to Grotenkemper & Co. at sixty cents per gallon, with a reserved interest of one half the net profits. But what arrangement was made as to the expense, rather what was to be regarded as expense, does not distinctly appear. In the absence of proof only the warehouse expense and at most a commission for selling could be allowed in such a transaction. Therefore Grotenkemper & Co. could charge either interest or commission for advancing they should make it appear that such was the contract, and as this does not appear in the case, the account should be adjusted on the basis of this opinion.

This judgment not being in conformity with this opinion, is reversed, with directions for further proceedings consistent herewith.

Fisk, for appellants.

Stevenson & M., for appellees.

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WILLIAM A. RAUSE v. THOMAS DEACON.
Executors and Administrators—Personal Claim—Suit for.

An administrator, cannot sue himself as such, for personal service rendered the estate.

Same—Limitations.

The statute of limitations does not run against the personal claim of an administrator, after his appointment.

Same—Compromise, not Accepted—Evidence.

The proposition of an administrator, for a compromise of a less sum than the amount of his claim, which was not accepted, is not conclusive against him and should not be offered in evidence as such.

APPEAL FROM BULLITT CIRCUIT COURT.

June 2, 1870

OPINION OF THE COURT BY JUDGE HARDIN:

The appellant being the curator of the estate of J. A. Deacon, deceased, could not sue himself on his claim for services, and the statute of limitations did not run against his claim after his appointment, according to a well settled rule of law; therefore so much of his claim as accrued within the last five years of Deacon's life was certainly not barred, but there is express proof of a recognition of the claim and a promise to pay it by Deacon within that time, which seems to have been sufficient to take the whole claim out of the operation of the statute, and there is no satisfactory evidence that it was ever paid or discharged. The circuit court in rejecting the entire claim seems to have adopted the view of the commissioner that it was either paid or barred by limitation, a conclusion which we think was not authorized. But there is much difficulty in determining from the evidence what amount of the claim should have been allowed. It appears from the testimony of Carpenter, the judge of the county court before whom a partial settlement of the estate was made, that said claim as then exhibited, and claimed as just by the appellant,

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was about \$300, but for the sake of a settlement and to avoid litigation he was willing to accept, as a compromise, an allowance of \$100, or \$175 of the claim. The evidence of his entire services for which nothing was allowed, would we think, have sustained a larger claim than \$300, but although he was not concluded by his proposition to compromise at a less sum, which was not accepted, we do not think he should have been allowed more in this suit than his claim as exhibited at the settlement before the county judge, say, \$300 as against the five distributees of the estate. The judgment in favor of the appellee, Thomas Deacon, for \$104.92 should therefore have been credited by \$60, being the fifth part of said sum of \$300, and to that extent only, the judgment is deemed erroneous.

Wherefore the judgment is reversed, and the cause remanded for a judgment in accordance with this opinion.

Thompson, Johnson, for appellant.

Field, for appellee.

M. P. NORCUM v. SARAH SHIVIL.**Adverse Possession—Evidence of Occupancy.**

Evidence of the occupancy of a tract of land, over-lapping on an adjoining tract, for more than 20 years, sufficient to constitute title by adverse possession.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

June 1, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

This suit involved the title to a small parcel of ground in the town of Mt. Vernon, claimed by the appellee, Sarah Shivil, as part of lot No. 14, conveyed to her by James C. Jones and wife by a deed, dated November 26, 1866.

The defendant, Norcum, who claimed lot No. 15 under a title adverse to that of the plaintiff, denied that the title deed of Jones and others, under whom the plaintiff claimed, embraced the ground

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in dispute, and relied on an adverse possession of the ground for over 20 years. The court rendered a judgment for the plaintiff, and Norcum has appealed.

There seems to have been some difficulty in ascertaining the precise location of the lots of the town as originally laid out, but we think the conclusion is authorized from the evidence, that the ground in contest is part of the original boundary of lot No. 14, but it appears from the testimony, Hawk, a remote vendor of lot No. 14, under whom the plaintiff's title is derived, who purchased from W. H. Kirttz in 1854, that the supposed line to which he purchased and subsequently sold, did not include the ground in dispute, and the weight of the evidence is that for more than fifteen years or even 20 years, before the institution of this suit, Norcum and those under whom he claimed and who claimed to own and occupy lot No. 15, were in the peaceable adverse possession of the ground in controversy as part of lot No. 15 up to the line mentioned by Hawks, it being the site of an old fence, recognized as the line by Hawks and others.

We are of opinion therefore, that the judgment is erroneous.

Wherefore the judgment is reversed and the cause remanded for a judgment dismissing the action.

Carter, for appellant.

DUNCAN FLOOD & Co. v. W. R. NUTTER ET AL.

New Trial—Grounds for Failure to Prepare—Failure to Answer.

A defendant, if not informed by their attorney of the situation of their suit, must inquire of the action, and file their answer within the prescribed time, the negligence of their attorney in failing to notify them, not being grounds for a new trial.

Pleading—Allegations in Petition Sufficient.

Allegations in substance of a promise to pay one "Sebree the difference on 43 hogs which he purchased at \$5.75 per hundred and delivered to them at \$6.00 per hundred," the difference in price amounting to \$40.00, sufficient to constitute a cause of action.

APPEAL FROM JEFFERSON CIRCUIT COURT. C. P. DIV.

April 22, 1871.

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OPINION OF THE COURT BY JUDGE PETERS:

The peculiar circumstances of this case have induced the court to consider it with more than ordinary care.

The sufficiency of the 2nd, 3rd and 4th paragraph of the petition is called in question by one of the learned counsel for appellants, and his objection will be first disposed of.

In the 2nd paragraph it is expressly alleged that Sebree was engaged 17 days in weighing and driving hogs for appellants for which they agreed and promised to pay him \$3 per day. And in the 3rd it is alleged that they were indebted to him in the sum of \$29.35 for expenses incurred by him in managing, driving, and shipping hogs by rail to Louisville for them, and for which they agreed and promised to pay, &c. The services are here distinctly set out, with the averment in each paragraph of their performance.

As to the 4th paragraph there was an apparent difficulty, the cause of action is not explicitly stated, and the meaning not clearly expressed; but upon examination the indebtedness is substantially alleged to arise on a promise by appellants to pay *Sebree*, the difference on 43 hogs which he purchased at \$5.75 per hundred, and delivered to them at \$6 per hundred that difference in the price amounting to \$40 and thus understood, the cause of action is made out.

Nor could the judgment be set aside on the other grounds relied upon with a departure from long and well established rules.

While the attention of the attorney was taken from this case by pressing engagements, and perhaps the more clamorous calls of other clients; appellants themselves have shown no diligence whatever. The summons was executed on Floyd the 24th of June. and on Long the 13th of July, whereby they were warned to answer in 20 days, and although it was not then served on Duncan, he in July engaged the services of General Harlan to defend the action, so that all the partners were fully aware of the existence of the action, and still it does not appear that either of them ever called on their attorney from the time of his employment, until after the judgment was rendered, which must have been a space of nearly three months. The summons informed appellants that Butler was a party plaintiff in the action, and if they failed to give their attorney the style of the suit, and

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he was deceived thereby, they alone were in default. But they knew that in order to avail themselves of their defense they must put in an answer, they also knew that the answer was due in 20 days from the service of the summons, and if their attorney failed to call, and inform them of the situation of the suit within the time, it was their duty to inquire into the matter, and prepare their case for trial. But according to their own showing, they never inquired into the progress of their suit, and never had an interview with their attorney, from the time they engaged his services, until after the judgment was rendered against them, a period of nearly three months.

If for such reasons as are set forth and relied upon in this case, judgments can be set aside, negligence in suitors will be licensed, and all confidence in the stability of judicial proceedings destroyed. Sufficient grounds for a new trial are not made out, and it cannot be granted without disregarding the well established rules on the subject of granting new trials, approved and adhered by the wisdom of long years.

Wherefore the judgment must be *affirmed*.

James, Harlan, for appellant.

Eastin, Castleman, for appellee.

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SILAS F. MILLER v. JACOB W. FUNK.

Appeal and Error—Final Orders—Judgment not Final.

An order of the lower court, adjudging the dismissal of former suits null and void, and that the allegations of the petition for revivor were sufficient to give him jurisdiction, and retaining the cases for further preparation and trial on their merits, is not such a final order, from which an appeal will lie.

Same—

A judgment to be final, must not merely decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose, without further action by the court, or by process for contempt.

Same—

Should the chancellor set aside orders dismissing the actions, and ordered the court in which they were pending to replace them on the docket of preparation and trial after the expiration of the term his power over them would have ceased, and an appeal therefrom would be allowed.

APPEAL FROM LOUISVILLE CHANCERY COURT.

June 1, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

In March, 1864, S. S. Bush and H. C. Shevell, attorneys at law residing, and practicing their profession as partners in the City of Louisville, under an engagement with appellee for the purpose, brought two actions for him, and in his name, against Silas W. Miller, in the Jefferson Circuit Court. In the one case charging that Miller was indebted to him in the sum of \$2971.50 for money laid out, and expended, and services performed for his benefit, and at his special instance and request, and prayed judgment for said sum. And in the other, that he was employed by Miller as his agent to purchase beef cattle for him in Kentucky and draw on him for the price of the cattle, which he might purchase from time to time, making the drafts therefor payable on sight— That having purchased cattle under his

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employment aforesaid, and delivered them to Miller, to the amount of \$2850, he drew on him for said sum, making the draft payable on sight at the Bank of Kentucky, and to pay the persons from whom the cattle were purchased got the money on said draft at the branch of said bank at Bowling Green, as they lived near that place. That the holder of the draft sent it to the place of payment, of all which Miller had notice, but refused to accept or pay it, and after having the same protested, the bank sued appellee, and caused him to be arrested, and held to bail, and while in custody, he was compelled to raise the money at great sacrifice, to pay the draft to procure his discharge. And for the alleged wrongs, and the money advanced he sought judgment against Miller for \$5,000.

In the last named case Miller filed a demurrer on the 26th of May, 1864, and on the same day filed an answer, counter-claim and set-off; a reply was filed by appellee, traversing the material allegations of the counter-claim, but the demurrer was not disposed of.

In the other case appellant on the last named day filed a demurrer to the petition, but filed no answer, and it does not appear that the court ever disposed of the demurrer.

Appellee took the depositions of quite a number of witnesses, conducing to sustain his claims, and whether or not the cases were fully prepared for trial on the part of appellee on the 13th of May, 1867, to which term of the court, they had from time to time been continued it is not necessary, nor proper that this court should express any opinion; but on that day an order to the following effect was made in each case.

On motion of plaintiff by attorney ordered that this case be, and is hereby dismissed and settled.

Appellee resided in Missouri, and was not present when these orders were made, and may not have even heard of them for a year afterwards.

In June, 1868, he commenced proceedings by rules against his said attorneys, to compel them to pay over to him one thousand dollars which he charged they had received from Miller for dismissing his suits against him, his efforts resulted in a personal judgment against Shivell alone for \$1,000, with interest from the 1st of June, 1867, and costs, from which he realized nothing on account of the insolvency, or non-residence of Shivell,

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or both; as to Bush his rules were discharged. He then in January, 1869, instituted two suits in the Louisville Chancery Court against Miller, Bush and Shivell, in which after alleging the facts in relation to the institution of his two actions against Miller as herein stated, and making transcripts thereof parts of his petition, he alleges substantially in each, that he had by the evidence taken by way of deposition established his right to recover against the defendant in said actions, and if the same had been tried on the merits, he would have recovered the amount claimed by him in each, but that on the 23rd of May, 1867, by a fraudulent combination between the defendant in said actions, and his said attorneys, whom he had engaged to prosecute the same, the latter pretended to compromise his demands, against the former— That it does not appear in the orders for the dismissal of his actions which were made without his knowledge, and consent, and without authority that his attorneys received anything therefor; but that they received one thousand dollars from Miller as the consideration for surrendering his claims, and dismissing both of his cases against him, that said attorneys acted without authority from him, and that Miller knew they had no such authority, and that he has never approved or ratified said acts of his attorneys— That he had no information, and never heard that his suits were dismissed until May, 1868, that although his said attorneys knew he resided in Missouri, neither of them ever wrote to him, or informed him of what they had done, that Miller resided in Ohio in May, 1868, and continued to reside there until a few weeks before he instituted these actions, and that when he made the arrangement with Bush and Shivell to pay them \$1,000 to dismiss said actions against him, they were insolvent and he knew it— And concludes with a prayer that the orders dismissing his actions, and the judgments rendered against him for costs, be set aside, and that he be permitted to prosecute his said actions and for general relief.

After Miller's demurrers to the petitions were overruled, he filed answers, in which he denied that appellee had any causes of actions against him, or had made out the same by proof, but averred that he believed he would if the cases had been tried on their merits recovered judgment on his counter-claim, and that while the actions were pending appellee often applied to him in person to compromise them, which he declined, but that they

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had been kept on the docket longer than he expected, that he had in the mean time removed to Cincinnati, and wishing to avoid further trouble, and to rid himself of law suits in Kentucky, he became willing to compromise, and accepted a proposition to pay one thousand dollars, and a portion of the costs to settle said suits, and paid the money to appellee's attorneys; but denies that it was effected by a fraudulent combination or arrangement with said attorneys, or that he thereby perpetuated any fraud on the rights of appellee. He avers that said attorneys had authority to make said compromise, and in an amended answer refers to, and makes a letter written by appellee to them a part thereof, by which he insists full authority is given them to compromise the suits. He denies having any knowledge, or information sufficient to form a belief of the insolvency of said attorneys.

Upon the evidence taken and the agreement of facts by the parties the cases were submitted—and the court below being of the opinion that appellee had not given his attorneys any authority to compromise his said actions, and that he had not ratified said compromise by any act, adjudged the orders dismissing them null and void, and further adjudged that the allegations of the petitions were sufficient to give the Louisville Chancery Court jurisdiction to hear and decide the cases, and therefore retained them for further preparation and trial on their merits—and from those orders, and judgments Miller has appealed.

The first question presented for judicial determination is whether the judgment appealed from is final.

This court in the case of *Apperson v. Bondurant*, 4 Met. 30, after a review of the authorities on the question concluded that the following rule was deducible therefrom—"That a judgment to be final must not merely decide that one of the parties is entitled to relief of a final character, but must give that relief by its own force, or be enforceable for that purpose, without further action by the court, or by process for contempt."

In the case of "*The Maysville and Lexington Railroad v. Punnett*, 15 B. M. 48. It is said "that a final order either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such a manner as to put it out of the power of the court making the order, after

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the expiration of the term to place the parties in their original position.”

Tested by these and other authorizes to the same effect— Can the orders under consideration be considered as final, and from which an appeal will lie to this court?

They certainly do not terminate the actions, for the court expressly retains them for further preparation, that they may be tried on their merits— Nor have they put it out of the power of the court to place the parties in their original position, although the term at which they were made has expired, for the court may at any subsequent term dismiss the suits, upon the ground that the attorneys had the authority to compromise the former actions, or on the merits, or any other grounds which might seem equitable, or proper.

If the chancellor had set aside the orders dismissing said actions, and ordered the court in which they were pending to replace them on the docket for preparation and trial, (for which his jurisdiction can not be questioned), after the expiration of the term, his power over them would have ceased, and might have put an end to the suits in his court. But he did not make such orders, nor are those made enforceable without further action by the court.

We therefore, conclude that the orders appealed from are not such final orders, or judgments as confer jurisdiction on this court—and the appeals must therefore be dismissed.

Thompson Booth & Kline, for appellant.

D. M. Rodman, J. B. Cochran, Brown & Murray, for appellees.

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A. RAIMY'S ADMR. v. HENRY WILLIS, ET AL.

Partnership—Settlement—Conclusive as to Anterior Transactions.

In the absence of fraud or mistake in a settlement made by partners themselves, and not waived or abandoned by them, a court of equity will commence with it, in proceeding to state an account between them, and regard it as conclusive of all antecedent transactions appearing to have been embraced therein.

APPEAL FROM MERCER CIRCUIT COURT.

June 3, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

Alexander Raimy and Samuel Willis were partners in buying, feeding and selling cattle in 1862, and in the fall of that year they both joined the Confederate army and left this State, leaving in the control of Henry C. Willis, as their agent about 32 head of cattle, which they had purchased from different persons, several months before, and in December, 1862, H. C. Willis sold the cattle at auction in the City of Lexington for about \$746.15.

Raimy died shortly afterwards, and George W. Raimy having become his administrator, prosecuted this suit against H. C. Willis and Samuel Willis, who had become a non-resident of the State, to recover against H. C. Willis one half of the proceeds of the cattle sold by him.

Samuel Willis was only constructively before the court, but the other defendant, who claimed to have been jointly interested with him, controverted the plaintiff's claim, and setting up various payments, as made by himself and Samuel Willis, for the firm, alleged that a balance was due to him from the estate of Alexander Raimy, deceased.

After a reference to a commissioner, who reported a balance as due to Samuel and Henry Willis from the estate of Raimy of \$123.62 1-2, the court upon exceptions to the commissioner's report, rendered a judgment in favor of the defendants jointly against the plaintiff, as administrator, for \$48.62, from which

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this appeal is prosecuted by Raimy's administrator, and the appellees have prayed a cross appeal.

While it appears that H. C. Willis rendered services and made payments for the firm of Raimy and Willis for which he should be credited, the allegations made in his answer, to the effect that he was a member of the firm, was not proved, but waiving this and also the irregularity of rendering a personal judgment in favor of Samuel Willis, who was not actually before the court, the judgment is deemed erroneous and must be reversed on another ground.

It conclusively appears that about the 12th of July, 1862, and after the purchase of the cattle sold by H. C. Willis, and the payment of several sums of money, embraced by the commissioner's report, on which the judgment is based, said Alexander Raimy and Samuel Willis made a settlement of their respective accounts, connected with the partnership, which resulted, as they announced, in the finding of a balance of only \$5, as due from one of them to the other.

It is a well settled rule that in the absence of fraud or mistake in a settlement made by partners themselves, and where such settlement has not been waived or abandoned by them, a court of equity will commence with it, in proceeding to state the account between them, and regard it as conclusive of all antecedent transactions appearing to have been embraced by it. (*Hauvre v. Calmisnil*, 1, *J. J. Marshall*, 506; *Story on Partnership*, Sec. 349.)

Although the settlement as proved, may have embraced previous partnership transactions, we are of opinion from the evidence, that it included the claims of the partners for all payments therefore made for cattle, or on partnership account, and that in determining what balance, if any, was due to Raimy's estate from H. C. Willis, or from it to him, he should have been charged with the amount received by him, and credited by the amount of his services and payments for the firm of Raimy and Willis, as between him, and them jointly, and as the plaintiff can only receive any balance due the estate of his intestate, the court should also, adopting said settlement as a basis, ascertain the respective interests of Raimy's estate and Samuel Willis, in the balance, if any, in the hands of H. C. Willis, and adjudge as between the plaintiff and H. C. Willis, excluding the interest

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of Samuel Willis, as to which no judgment should be rendered.

It is deemed unnecessary to notice the details of the report and judgment further, except as to the sale of three head of cattle made by Samuel Willis for Confederate currency. If this was not adjusted in the settlement, Willis should not be held accountable for the real value of the cattle, but only for the value of the currency he received, it not appearing that Raimy did not sanction the sale, and the place of the contract having been at the time within the military lines of the Confederate States.

Wherefore the judgment is reversed and the cause remanded for further proceedings and a judgment in conformity to the principles of this opinion.

Polk, for appellant.

Kyle, for appellees.

JOHN L. SLAVIN v. H. W. DUNN ET AL.

Judgment—Facts Submitted and Tried by the Court—Erroneous Verdict.

Though the laws and facts be submitted to and tried by the court, and a judgment rendered thereon is entitled to the same weight as the findings of a jury, if contrary to the weight of the evidence, the verdict will be reversed.

Sheriffs and Constables—Liability of Deputy for Money Collected—Coincidence of Payments by Checks, and Receipts given.

(See also volume 3 Kentucky Opinions, page 316.)

APPEAL FROM GARRARD CIRCUIT COURT.

June 22, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Appellant was sheriff of Garrard county and collector of revenue and county levy for 1866 and 1867, and appellee, his deputy. Each did half the business in the way of collecting taxes and revenue and divided the county with that view. One taking the

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upper and the other the lower end, and appellee was to pay to appellant the revenue as he collected it. The amount of taxes and public dues on appellee's side, to be collected and accounted for by him, amounted to \$13,291.75. And this action was brought by appellant against appellee in February, 1869, alleging that of said sum appellee had failed to pay over and account for \$1,324.51, and to recover that, the action was brought.

Appellee, in his answer, claimed that he had overpaid the amount by \$192.94, and asked judgment for that sum, and filed a statement of payments with a number of receipts and vouchers. In his reply, appellant admits all the credits claimed by appellee, except a check on National Bank of Lancaster for \$300; another check on same for \$900, and a credit claimed for \$338.45, a list of taxes charged to have been collected by him on appellee's side of the county—of the last item, however, he admits—G. W. Bett's tax, \$9.35; J. F. Chrisman, \$15, and F. J. White's tax of \$6.48.

The law and facts were submitted to the court, and judgment rendered in favor of appellant for \$107.06, and he appealed, and appellee prosecuted a cross-appeal.

It is admitted that appellant got the \$900 for which appellee gave his check, and also the \$300, but it is insisted that the \$300 paid by the check for that sum, are included in a receipt of the same date of the check, viz., 24th December, 1866, for \$543.48. And that the \$900 paid in a check on January 18, 1866—but should be 18th January, 1867—are included in a receipt given by appellant to appellee dated 25th January, 1867, for \$964.17.

Appellant's theory is that the \$300 for which the check was given, and \$243.45 of the taxes collected by him from taxpayers living on appellee's side of the county, make up the amount of the receipt for \$543.45, and that the \$900 paid on the check on January 18, 1867, John D. Adams' tax, \$22.90, and N. Sandifer's tax of \$41.27, make up and compose the receipt for \$964.17.

The court below adjudged that the receipt for \$543.45 included the \$300 paid on the check of the same date, and gave appellee credit for \$543.45, and rejected his claim for credit for the \$300; but allowed him credit for the \$900 paid on the check, and also the \$964.67 evidenced by the receipt. With this judgment we concur. It is an impressive coincidence that the taxes of Sandifer and Adams added to the \$900 make up precisely the

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amount of the receipt for \$964.17, and the \$64.17, the \$243.45 included in the receipt for \$543.45, and Bett's tax of \$9.35. Chrisman's tax of \$15 and White's tax of \$6.48 when all added together make up the sum of \$338.47, within two cents of the amount appellee alleges the taxes amounted to on his side, which appellant collected, being only two cents over the amount.

It is true that Anderson proves that at the January court, 1867, appellee offered to return J. D. Adams as a delinquent, and appellant stated that he was good, and his taxes would or could be collected; and it does not appear that he then claimed that he had accounted to Dunn for it, although that took place three days after the receipt was given, as the proof shows; and it would seem that if the settlement of Adams' tax had been made only three days before appellee proposed to return him as a delinquent, appellant would have replied that it *was* paid, instead of saying it could or would be paid. But we do not consider that circumstance strong enough to overturn the several coincidences before referred to, which amount to arithmetical demonstration; besides, all the payments made by appellee of any magnitude appear to have been paid by checks on the national bank, and there is no check corresponding with the receipt for the \$964.17, which is a very significant fact.

We are aware that in trials of this sort where the law and facts are referred to the court, the judgment is entitled to the same weight that the finding of a jury would have. Still, in this case, we think the evidence greatly preponderates against the conclusion to which the circuit judge arrived, and we cannot concur with him.

Wherefore, the judgment is reversed on the original appeal, and the cause is remanded for a new trial, and further proceedings consistent herewith.

McKee & Hopper, for appellant.

Owsley & Burdett, Dunlap, for appellees.

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GEORGE HOWK *v.* O. D. McMANAMA.**Evidence—Declarations Admissible, made at time of Transaction.**

Declarations made at the time of the transaction, and expressive of its character, motive or object, are regarded as verbal acts, indicating a present purpose and intention, and are therefore admitted in proof like any other material facts.

APPEAL FROM GRANT CIRCUIT COURT.

June 21, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The court gave the only instruction appellant asked for, and if the one given on motion of appellee was erroneous, we could not reverse the judgment for that error, because the instruction was not objected to by appellant when it was offered. Nor can we regard the verdict as so palpably against the evidence as to authorize us to interpose and award a new trial. The case is then narrowed down to one question; and that is, did the court below err in excluding as evidence from the jury the following statement in Goodwin's deposition, and Howk "said when he started, he intended to settle with McManama, and take his note when Howk returned he showed me a note signed by McManama in pencil; on the note was a memorandum to the effect if the note was not right, the account should be opened again." The main fact in issue in this case is, was the paper sued on executed by appellee?

Whether the declarations offered in evidence by him, and rejected by the court, are competent, depends upon whether they were made at the time facts kindred to the main fact transpired, and are so connected with them that the whole harmonize and form one transaction.

At the time the paper purports to have been executed, it clearly appears from the evidence that appellee was indebted to appellant in the sum claimed by him; he left the witness Goodwin for some purpose, and after being absent how long is not explained, he returned and exhibited a paper partly written

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in pencil, and partly with pen and ink, to him with the name of appellee (not spelled perhaps as he spells his name), but the paper then exhibited corresponds with the one sued on in the manner of its execution, and amount, and containing as this one does the reservation of the right to open the transaction if appellee should discover that there was any error in it. The note is entered on appellant's book, and the account closed in that way. The absence and the return of appellant corresponding in time with the date of the paper, his exhibition of it to the witness, the entry on the book, and the indebtedness of appellee, were all facts susceptible of proof.

Now were the declarations offered in proof so connected with the main fact in issue as to illustrate the motive and object of appellant in what he did, and to entitle him to the benefit of them as evidence.

In section 10R, *Vol. 1, Greenleaf on Evidence*, it is said:

"Declarations made at the time of the transaction, and expressive of its character, motive or object, are regarded as 'verbal acts' indicating a present purpose and intention, and are therefore admitted in proof like any other material facts."

Upon authority and principle, it appears that the statements rejected by the court below were competent evidence, and should have been admitted, as constituting connecting links of the same transaction.

Wherefore, the judgment is reversed, and the cause is remanded with directions to award a new trial, and for further proceedings consistent herewith.

Smith, Scott, for appellant.

McManama, for appellee.

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SAM JOHNSON v. RICHARD J. SHANNON.

Vendor and Purchaser—Assignment of Title Bond—Liability of Assignor.

The assignor of a bond for title is not liable thereon, until the assignee has by due diligence prosecuted a suit against the obligor in the bond, or his representative and has failed to procure a conveyance.

Contracts—Reformation—Mistakes.

In order to confer power on a chancellor to reform a contract, there must be fraud or mistake, and the one or the other must be charged.

Fraud—Allegations of in Petition.

A charge in a petition for reformation of a contract "that some of the terms of the contract were omitted" is not sufficient allegation of fraud or mistake.

Trial—Sufficiency of Summons.

In case where a summons is served 20 days before the commencement of the term at which a judgment is rendered, held that plaintiff was justly entitled to a trial, unless there was an issue of fact made by the pleadings.

APPEAL FROM FRANKLIN CIRCUIT COURT.

June 17, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

It is admitted in the answer that Joseph Waits had the legal title to the land when he sold it by executory contract to John Gahle, who sold to Shannon and assigned to him the bonds of Waits, and he assigned said bond to appellant; whereby he was invested with the legal title to the bond, and before he can make his assignor responsible, he must show that he has with due diligence prosecuted a suit against the obligor in the bond, or his representatives, and has failed to procure a conveyance, or that his estate is insolvent; or that his assignor committed a fraud in making the sale to him.

The answer contains no such averments.

Whether or not that part of the contract which as is said in the

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answer was omitted, was intended to be inserted as a part of the assignment on the bond is not alleged. But in order to confer power on the chancellor to reform a contract, there must be fraud or mistake, and the one or the other must be charged, which is not done in the answer in this case. To say that "some of the terms of the contract were *omitted*" is not an allegation of fraud, or mistake; they might have been omitted by design; the parties may never have intended that they should have been inserted, and still all that is averred in the answer on that subject be true.

The 1st paragraph of the answer presented no issue of fact, and the demurrer having been properly sustained, it was out of the case; and nothing was left except the 2nd paragraph, which only presented a partial defense, and claimed a credit for \$25.00. Judgment was rendered for so much of the demand as was not contested, and the action was continued as to the residue.

By section 395 Civil Code, the plaintiff is entitled to a trial in actions by equitable proceedings at the first term after the summons has been served on all the defendants, as provided in section 137, where no issue of fact is made by the pleadings, or where the plaintiff consents that the statements of the answer may be taken as true.

In this case, the summons was served more than 20 days before the commencement of the term at which the judgment was rendered in the county in which the action was brought, and under section 137, Civil Code, appellee was entitled to a trial, unless there was an issue of fact made by the pleading.

To the extent that an issue of fact was made, the cause was continued; and for so much as no issue of fact was made, judgment was rendered—which we think was a compliance with the spirit and meaning of the sections of the Code *supra*.

Wherefore, the judgment is affirmed.

Scott, for appellant.

James, for appellee.

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ZEB. WARD, &C. v. WILLIAM CLAXON, &c.

Evidence of Accounts Between Litigants not Supporting Verdict.

Where the evidence shows a confusion of accounts, a verdict predicated thereon will be reversed.

APPEAL FROM FRANKLIN CIRCUIT COURT.

June 3, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

This case was submitted to the jury without instructions, none having been asked, nor given, and all the evidence offered on the trial was heard without objection. The only question therefore presented by this appeal to this court is whether the judgment as rendered after a remittur of near one thousand dollars by appellees of the verdict found by the jury, can be sustained by the jury?

A most careful and laborious examination and analysis of the evidence has not enabled us to ascertain the data on which the jury reached the conclusion to which they came, nor the result at which the court arrived after deducting the amount of credits given on their account by appellees from the indebtedness proved by them.

Whoever may have the labor of examining the accounts as presented by both parties, cannot escape the conviction that neither party kept regular books. The list of credits given by Morgan Perry and attached to his deposition, which he proves was given out to him by Hall, and constituted all he then claimed corresponds precisely with the list of credits attached to appellees' account filed with their petition—even in the confusion of dates. On which some credits of May precede others of April of the same year, and these irregularities appear precisely alike on each, which scarcely could be the result of accident. Again appellants after the fullest of denials of an employment of appellees by them, as charged in the petition, present an account of advancements of money made by them to appellees, which would be inexplicable upon any other hypothesis than that appellees were engaged in

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making purchases of some kind for appellants. The account of advancements presented with the answer, and the manner of entering the dates of payments show that the account was negligently kept. The first item charged on said account is of date 25th of May, 1865, T. M. Jones, \$500. And the next is 21st of December, 1864, William Claxon, \$3000. And there are others of similar character which could be referred to.

These irregularities are mentioned to show how negligently the parties seem to have kept their accounts. But as the case must be sent back for another trial, it would be improper for this court to enter upon an analysis of all the evidence and present its conclusion of what would be the proper judgment in the case. It must suffice to say that after a very full examination of the evidence and the pleadings in the case, with the accounts as presented by the parties, this court has been unable to find from the evidence that the indebtedness of appellants to appellees as great by a considerable amount as the judgment complained of is rendered for.

We suggest without giving any positive instructions on the point whether a more satisfactory result would not be reached by referring the case to a skillful accountant, as commissioner to audit and state the accounts of the parties.

For the reasons stated the judgment must be reversed, and the cause remanded for a new trial and for further proceedings consistent herewith.

Craddock & Trabue, for appellants.

Lindsey & Rodman, for appellees.

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M. G. WALTON v. ISAAC MIZE.**Vendor and Purchaser—Parol Agreement for Rescission.**

Evidence of a parol agreement for the sale of land, or promise that the vendor should have the land back, by refunding the purchase price, with interest, is not such an agreement or contract as can be enforced, under the statute.

Landlord and Tenant—Payment of Rent in other than Specified Manner.

Where a tenant makes a tender of rent, which was payable in money, by offering corn, the amount must be measured up and set apart specifically for that purpose.

APPEAL FROM ESTILL CIRCUIT COURT.

June 11, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The evidence of a parol agreement for a sale of the land to appellant, or promise that he should have the land back by refunding the price paid, with interest, is not such a contract or agreement under the statute as can be enforced; but the numerous obligations executed by appellant to appellee for the rent of the place, indicate very strongly that the parol agreement for a re-sale of the land was abandoned by the statutes.

Appellee in his petition charges that he demanded a surrender of the possession of the land to him several times before he commenced his action, and that averment in the petition is not denied in the answer. And if it were, a notice to surrender the possession is very clearly proved.

The rent was fixed at a certain price in money, and if appellant wished to discharge it in corn, which he had a right to do, she should have measured up the corn and set it apart for appellee.

No claim is made and set up in the answer for pay for improvements, and proof without allegations will not authorize relief.

Appellant admits the sale and purchase by appellee of the

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land under the judgment in the case referred to, and does not question its validity in his pleadings.

After a careful examination of the record, and consideration of the several objections made by counsel to the judgment, we see no error available for a reversal.

Wherefore the judgment must be *affirmed*.

Lilly, for appellant.

J. W. GATE v. J. A. ROUSE.

Pleading—Allegation of Failure to Put in Machinery in Partnership.

Though a partner, who had agreed to put in certain machinery into a partnership, failed to comply, but disposed of it and bought other machinery of less value, he cannot be held liable in the absence of an allegation in the petition that the specific machinery alluded to was to be put in, nor from which such fact could be inferred.

Partnership—Failure of One Partner to Comply with Terms.

One of a firm, who agrees to furnish certain machinery, but who sold same and bought other machinery of an inferior kind and quality, will be held liable for the loss thereby sustained.

Evidence Must Illustrate Issue.

Evidence, unless it illustrate some issue made by the pleadings, is not allowable in judicial proceedings.

Same—Allegations—Proof.

Without allegations of a breach of agreement, the most positive and direct proof is unavailing.

APPEAL FROM DAVIESS CIRCUIT COURT.

January 21, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

By the terms of the articles of co-partnership, Rouse put into the firm for the purpose of prosecuting the business for which it was formed seven acres of land described in said articles, "his

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saw-mill and distillery, and all the fixtures and machinery pertaining thereto, all the cars, machinery and fixtures now (then) owned and used by him in the mining of coal, 3 wagons, 3 yoke of oxen, set of blacksmith's tools, and one pony, all of which is (was) valued and agreed by the parties to be worth \$3,200."

"And the said Cate agrees to put into said concern 2 carding machines, one spinning jack, 2 looms, one wool picker, and all the machinery and fixtures belonging to a carding machine, a set of carpenter's tools, and 2 horses, valued and agreed upon between the parties at \$1,700, and the said Cate hereby (by said writing) agrees, and binds himself to make up the balance necessary to make him equal with Rouse, to-wit: \$750, by the payment of cash or its equivalent." This quotation includes the capital each partner was to furnish according to their estimate, and the terms of their agreement to make them equal. Why they agreed that the carding machines, horses, etc., furnished by Cate, valued at the \$1,700, and cash, \$750, were to make him equal with Rouse, whose property put into the firm was valued at \$3,200, was for them to determine, and is not for the court now to inquire into. But from the language of the written articles we must assume the property put in by each was, at the date of the writing inspected, by the partners respectively, and appropriated to the use of the firm.

Rouse brought this suit, and alleged as breaches on the part of Cate, that he had failed to pay said \$750 according to his undertaking in the articles of co-partnership, and had failed to furnish the amount and value of machinery that he was bound to do; that he only put in one loom, about ten dollars worth of carpenter's tools, one spinning jack, that he furnished two carding machines, fixtures, etc., but that they were old, much worn, and of little value; that they were originally constructed for carding cotton, and had to be repaired and changed so as to fit them for carding wool, all of which was done at the cost of the firm, and that the carding machines, fixtures, spinning jack, loom, tools and horses furnished by Cate were not worth more than \$875, instead of \$1,700 as agreed on by the partners.

He also alleged that the partnership only continued one year, Cate was the active operator, and business partner, kept the books, and received the proceeds of the woolen factory, and coal mining during the time, which amounted to the sum of \$1,000, for the

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one-half of which defendant was responsible to him, that he was responsible for the \$750, the cash part of the capital, which he failed to furnish, and \$412, the one-half of such machinery as he undertook and bound himself to furnish, but which he failed to do. And for these sums he prayed judgment.

The right to a recovery was controverted by the answer, and the case was referred to the master to report the state of accounts between the parties, who twice reported that the partners had failed to furnish him with any books, and he had no *data*, from which to make a report, except that he found the \$750 cash which Cate was to pay in, to complete his part of the capital, had never been furnished, and that it appeared from the evidence, when the partnership was formed that Cate owned two carding machines, then at the falls of Rough Creek, in Grayson county, one of which he sold to Green after said partnership had been formed for the sum of \$1,054, as may be seen by reference to Green's evidence, and had purchased a carding machine from one Argyle for \$130, which he had substituted in its place, and after deducting the \$130 from the price for which he sold the machine to Green, to-wit: \$1,054, it left \$924, and for the one-half of that sum, or \$462, and the \$750, making \$1,212, with interest from the 1st of December, 1860, he reports as the amount to which Rouse was entitled to a judgment against Cate. To this report Cate filed exceptions. The court below considered that from some evidence in the case in addition to a letter written by Rouse to Cate, that the latter had furnished the firm jeans and linsey manufactured by him at the falls of Rough before the formation of the partnership, and which belonged to him individually, and which he considered as having been put in to supply in part the value of the machinery sold to Green, and reformed the report of the master so as to allow Cate credit for \$400, for jeans and linsey furnished by him, and rendered judgment in favor of Rouse against Cate for \$992 with interest from the 1st of December, 1860, till paid, and costs, and Cate being dissatisfied with that judgment has appealed to this court.

Certainly the zeal and patience manifested by counsel in the very elaborate examination of witnesses in this case should satisfy the most exacting clients, as doubtless was done in this instance, and the desire to acquire knowledge (such as it is) concerning the difference between *double* and *single* machinery, although not a

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word is written in the articles of co-partnership as to whether the machinery was of the one or the other kind, and information in regard to wool pickers, and other articles belonging to such machinery, even down to the kind of bolts with which the machinery was put up, may be commendable to those who have tastes in that way, and time to devote to its acquisition. But evidence, unless it illustrates some issue made by the pleadings, is scarcely allowable in judicial proceedings.

Unquestionably, if appellant put the carding machines at Rough Creek into the partnership, when it was formed, and afterwards sold, or disposed of them, or any part of them, he would be accountable to his partner for the one-half of what he received, and if he got less than their value, he might, under certain circumstances, be chargeable with the one-half of their real value. In this case the petition contains no allegation that any of the machinery at the falls of Rough Creek was put into the firm, nor does it contain anything from which the fact can be inferred. There is no allegation that any of the machinery put into the firm was at that place, or had ever been there, and without allegation, the most positive and direct proof would be unavailing. Moreover, there is no allegation that the machinery which actually went into the firm was not the same contemplated and agreed on by the partners at the time they formed the partnership. It is alleged that the machinery, fixtures, etc., were "of greatly inferior value, much worn, and out of repair," etc. Now this may all have been true, and still they may have been the same agreed upon. If they were not the same, it should have been so alleged in positive and direct terms, so as to present no issue, and if they were the same, and they were represented to be, and a fraud had been imposed on them, that they were inferior in quality, or different in character from what appellee, that should have been averred. This is sufficient to show that the allegations of the petition are insufficient to authorize a recovery, for either the sale of that which was at the falls of Rough Creek, or for any defects in the machinery which was put up and used.

And for the want of proper allegations and pleadings appellant is not entitled to anything for jeans, etc., put into the concern, if any he put in, nor for the third carding machine.

Wherefore, the judgment is reversed and the cause remanded with directions to render judgment in favor of Rouse against Cate

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for \$750, with interest from the 1st of December, 1860, till paid, and costs in the court below, and for further proceedings consistent herewith.

Sweeny & S., for appellant.

Ray & Hardin, for appellee.

J. C. VANARSDAL v. COMMONWEALTH, FOR USE OF MERCER CO.
COURT.

Sheriffs—Official Bond—Failure of Commissioner to Settle—Risk of Sureties Increased by Order of Court.

A mere omission of the court of officers whose duty it is to require collectors of public dues to make regular settlements and to account promptly for the public moneys in their hands, will not of itself discharge the sureties of the collector from liability, but the sureties do not agree to be responsible for the funds retained in the hands of their principal under orders of the court.

Same—Laches—Sureties Released.

Where, by the action of a county court, in deferring a settlement with the sheriff, the appointment of commissioners to adjust a balance due by the sheriff some four months after the last day required by law, and said settlement deferred for a year, such laches will release the sureties on the sheriff's bond an account of whatever balance remains in the sheriff's hands after the January return day.

APPEAL FROM MERCER CIRCUIT COURT.

January 24, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The sheriff, Vanarsdal, was by virtue of his office the collector of the county levy for Mercer county for the year 1863. The conditions of his bond were that he would "well and truly collect, account for, and pay over to the persons entitled to receive the same, according to law, the county levy and public dues of the

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county of Mercer for the year 1863, and that he 'would,' when called upon by the county court, settle his accounts and pay over the amount, if any, of public money in his hands belonging to said county."

This suit is brought to recover from the sheriff and his sureties a balance of county levy remaining in his hands after the payment of the various amounts allowed to the county creditors at the court of claims held in said county in October, 1862. The law makes it the duty of the various county courts in the State in the month of September in each year "to cause a settlement of the sheriff's or collector's accounts to be made and reported, and for that purpose shall appoint some competent person or commissioner; and upon receipt and approval of said court, shall make such order concerning the remainder of the money, if any, due to the county as they may deem necessary for its safe keeping." The county court can require the sheriff to pay over 90 per cent of the county levy upon their settlement in September and at the following January, a final settlement "shall be made and the sheriff shall pay over any balance in which he may be found indebted. (Amendment to article 2d, chapter 26, R. S., Vol. 1, page 26.) By the Act of February 9, 1864, Myer's Supplement, page 126, the county court, the commissioner and the sheriff are required to perform their several duties relative to the settlement of the county levy under the pain of heavy penalties. The final settlement of Vanarsdal should have been made in January, 1864. It appears from the record that the appointment of commissioners to settle with him was not made until April, 1867, and that this settlement was not reported and approved until March, 1868. It further appears that the court of claims laying the levy held in October, 1862, directed the sheriff to collect the same, and pay the claims of county creditors "and retain the balance in his hands subject to the future orders of that court." The sureties of the sheriff rely upon these facts, as releasing them from liability to the county on account of such balance. The mere omission of the courts or officers whose duty it is to require collectors of public dues to make regular settlements and to account promptly for the public moneys in their hands, will not of itself discharge the sureties of the collector from liability. *U. S. v. Kirkpatrick*, 9th Wheaton, 733; *Keel v. Preston*, 5th Monroe, 584. But in this case there has been more than a mere omission upon the part of

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the county court of Mercer county to discharge its duty relative to the county levy for 1863.

The order making the levy directed the sheriff to "*retain*" the balance after the payment of the county claims, subject to the future orders of the court. The sureties did not agree to be responsible for funds "*retained*" in the hands of their principal under order of the court. Their undertaking was that he would, when called upon, settle his accounts and pay over any amount remaining in his hands in obedience to the orders of the court. The laches of which they complain are not the result of mere omission or neglect of duty upon the part of the county court, but the legitimate consequences of an order made by the court of claims. The peculiar province of which is to transact the financial business of the county. By the action of the financial representatives of the people of Mercer county, the risk of Vanarsdal's sureties was increased without their consent, and the effect of the same was to release them from all liability on account of the balance of the county levy remaining in the sheriff's hands after January, 1864.

Wherefore, the judgment of the court below is reversed, and the cause remanded with instructions to dismiss the plaintiffs petition as to said sureties.

Thompson, for appellant.

A Harding, Bell, for appellee.

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JOHN PEAK ET AL v. MARY HAYDEN ET AL.

Adverse Possession—Conflicting Claim of Title—Best Possession Prevails.

Where neither litigant shows documentary evidence of title derived from the government, a constructive possession will prevail over a claimant, who had not the property under enclosure.

APPEAL FROM MEADE CIRCUIT COURT.

January 30, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

In this suit of equity by the appellants vs. the appellees for trespass on land and a *quietus* as to title, neither party proved any documentary title derived from the Commonwealth, and there is some difficulty in a judicial determination of the possessory right.

The evasiveness of the answer of the appellees to the petition of the appellants and some admitted and established facts conduce strongly to the conclusion that the appellees have not had such possession, actual or constructive, of the land in controversy as to give them the right of possession. The appellants claim under Perciful, the appellees under Simpson, as owners of different tracts not conflicting in boundary.

It appears that Walker's line and one line of Simpson's patent are coincident, and that the appellees derive all their title from Walker, who claimed under Simpson.

The land in contest is not embraced by Simpson's line, but is included in the boundary sold by Perciful to the ancestor of the appellants, which calls for Walker's line as coincident with Simpson's.

And it is quite clear that neither Walker nor any person holding under him ever enclosed or actually occupied the land in contest, all of which lies beyond Simpson's line. And if he or any of them misconceived the local line as now indisputably established as not interfering with the claim of the appellants, their possession of other land embraced by Simpson's patent, did not give them constructive possession of any of the land beyond that time

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There was no apparent or presumable intention to extend the possession beyond Simpson's line. The appellees have, therefore, failed to show a possessory title.

On the contrary, the appellants have shown a constructive possession of the land in contest for years. Their possessory right appears, therefore, superior to that claimed by the appellees, and that is sufficient for this case, and ought to have ruled the decision of the circuit court, which nevertheless was against the appellants.

Daniel Haydon, under whom the appellees claim, recognized and admitted the line of Simpson and Walker as now established in this case. There could have been no constructive possession beyond that line so as to include the land now in controversy.

Wherefore, the judgment is reversed, and the cause remanded for a proper judgment in favor of the appellants for such damages as shall be assessed—for the alleged intrusion of their rightful possession.

Walker, Cofer, for appellant.

Kincheloe & Lewis, for appellee. .

PRATHER & SMITH v. J. WILSON & Co.**Tender—When not Regarded as Payment.**

A tender of the residue of goods purchased but not received, cannot be regarded as a payment, though they were afterwards sold by the assignee and the proceeds applied to the payment of other creditors, appellants only receiving their ratable portion.

Trial—Instructions—Objections.

To avail himself of an error in an instruction, the party against whom it is given, must object to it when it is offered, and if given, except to the ruling of the court.

Same

Where a litigant asks for an instruction, which is given by the court, he cannot afterwards complain, although it is erroneous.

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APPEAL FROM WOODFORD CIRCUIT COURT.

January 21, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

There is no evidence of any payment of the debt sued upon except the \$814.62, the value of the goods returned, and \$45.25 paid by Walsh as their *pro rata* of the proceeds of the sales of the property assigned for the payment of their debts by appellees.

The tender of the residue of the goods purchased by appellees from appellants, and not received by them can not be regarded as a payment, because they were afterwards sold by the assignee and the proceeds were applied to the payment of other creditors, appellants only receiving their ratiabale portion thereof. There is, therefore, no evidence to sustain the verdict.

The instructions, as asked by appellants, appear to have been given, and if they did not present the law of the case they have no right to complain, and even if the instruction given at the instance of appellees was erroneous, the ruling of the court in giving it does not seem to have been excepted to. This court has so often decided that to avail himself of an error in an instruction, the party against whom it is given, must object to it when *it is offered*, and if it is then given over his objections, he must then except to the ruling of the court in giving it, that it would seem useless to repeat it. And still this ruling is in a majority of cases, as in this, disregarded. We can not consider any error if there be one in giving the instruction as asked by appellees. But as in our opinion the verdict is not sustained by the evidence, the court below should have awarded a new trial to appellants.

Wherefore, the judgment is *reversed*, and the cause is remanded for a new trial and for further proceedings consistent herewith.

Field & Twyman, for appellant.

Porter, for appellee.

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S. B. COIL v. WILLIAM TAYLOR. . .

Order of Delivery—Specific Personal Property—Damages for Detention—Time of Assessment.

A fair and equitable construction for directions to assess damages for detention of personal property, requires that the assessment should embrace the entire detention, preceeding the trial.

Same—Instruction.

An instruction predicated upon this rule "that the jury should find for the Plaintiff damages for the detention of the horse, for the time so detained, both before and after institution of the suit," held not erroneous.

APPEAL FROM BALLARD CIRCUIT COURT.

January 7, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

In this action, brought by the appellee, for the recovery of a horse in the appellant's possession, of the alleged value of \$150, and damages for the detention thereof, the court instructed the jury in effect, that if they should find from the evidence that the horse, which remained in the defendant's possession during the pendency of the suit, was the property of the plaintiff, they should find, also, for the plaintiff damages for the detention of the horse for the time it was so detained, both before and after the institution of the suit; and the jury having found for the plaintiff the horse valued at \$135, and also \$50 in damages for its detention, and the court having rendered a judgment in conformity with the verdict, the principal question to be determined, on this appeal from the judgment is, did the court correctly instruct the jury with reference to the detention of the horse after the institution of the suit?

Section 360 of the Civil Code of Practice provides that: "In action for the recovery of specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever by their verdict there will be a judgment for the recovery or return of the property."

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And the 418th section of the Code provides that in such a case "judgment for the plaintiff may be for the delivery of the property, or for the value thereof, in case a delivery can not be had, as damages for the detention."

It was a settled principle before the adoption of the Code, in this State, that in an action for the recovery of specific property or its value, the estimation of the value of the property should be, as at the time of the trial, and not that at which the detention commenced. (*Freeman v. Lockett*, 2 J. J. Marshall, 393; *Penny v. Davis*, 3 B. Monroe, 313.) This common law rule is entirely consistent with the foregoing provisions of the Code, and may be adopted as expressing its correct construction as to the time intended for assessing the value of the property, to be alternately adjudged by the court to the successful party; and as during litigation, the property may, and often does become reduced or depreciated in value, in the hands of the unsuccessful claimant, a fair and equitable construction of the direction to assess damages for the detention of the property, requires that the assessment should embrace the entire detention of the property preceding the trial. There was no error, therefore, in giving to the jury the instruction referred to.

Nor does it appear to us that the court committed any error to the appellant's prejudice either in instructing the jury or overruling the motion for a new trial.

Wherefore, the judgment is affirmed.

White & Reeves, for appellant.

Rodman, for appellee.

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BEN TAYLOR v. J. W. TAYLOR.

Bond—Mutual Mistake in Giving—Second Surety not Liable.

Mistakes in the execution of a bond given, can be corrected like other instruments, where it is shown that a prior bond for the same purpose had been executed.

APPAEL FROM M'LEAN CIRCUIT COURT.

June 11, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The only question in this case is one of fact, whether the bond dated 8th of February, 1860, purporting to have been given by the appellant and John Brackett, that Hawkins would perform the judgment of the court in the action against him, is the act and deed of the appellant. He admits he gave a claimant's bond for the property levied under the attachment against Hawkins, but with Frank Wright instead of Brackett as his surety, under section 235 of the Civil Code, and Wright and Dexter prove the execution of such a bond, which was the only description of bond he can reasonably be supposed to have intended to give consistently with his claim to the property, and part in the controversy. The claim against Hawkins was not controverted by appellant, but only the appellee's right to subject property or money in appellant's hands to its satisfaction, which he resisted, claiming the property and denying that he was indebted to Hawkins, and, as Wright and Dexter prove, gave his bond as claimant of the property. It is difficult to conceive why he would have also executed another bond having the effect to make him liable for the debt of Hawkins, although he succeeded in sustaining his claim to the property. The sheriff failed to explain why he could have taken two bonds from the appellant, one with Wright as surety and the other with Brackett as surety, and the fair inference from all the evidence is that he took but one bond, which was understood and intended by the appellant, who could not read or write, to be such a bond as Wright and Dexter prove to have been

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given, and not that returned by the sheriff, which may have resulted from some unexplained mistake and without intentional wrong on the part of the officer. Nevertheless, we are of the opinion that it was not the binding obligation of the appellant, and the court erred in rendering the judgment to enforce it as such.

Wherefore, the judgment is reversed and the cause remanded for a judgment in conformity to this opinion.

Turner, for appellant.

L. P. Little, for appellee.

EDWARD WELLS ET AL v. JAMES A. RAGLAND ET AL.

Landlord and Tenant—Lease—Reduction in Rental by Loss of use of Part of Property.

A farm and mill was leased providing "that in case the mill dam should be removed by law, during said term (five years) a proper reduction in rent shall be made, etc., also providing for a payment of \$1000.00 annually. Held, that no reduction should be allowed on the contract for the time the mill remained undisturbed.

Same—Damages.

The damages for loss by removal of the dam, could only be estimated from the actual time of its removal, and would not affect the rent already earned.

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APPEAL FROM BATH CIRCUIT COURT.

June 14, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

By a contract made the 30th day of September, 1868, John D. Ragland leased to Edward Wells his farm containing about 1,200 acres of land and mill property situated thereon, upon Licking river, for a term of five years, commencing on the 1st of November,

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1868, for an annual rent of \$1,000, for which the lessee and James L. Warren, as his surety, executed their five promissory notes, but the following stipulation was expressed in the lease:

“That in case the mill-dam shall be removed by law, during said term, proper allotment of the rent shall be made, which if the parties can not agree upon shall be left to the award of two disinterested person, chosen by the parties for the purpose.”

The appellants being sued on their note for the first instalment of the rent, filed an answer setting forth the contract of leasing and alleging that by legal proceedings instituted under the laws, and by the authority of the State, said mill-dam was removed on the 6th day of November, 1869, Ragland, the lessee, being largely compensated in damages, and the mill, its fixtures and appurtenances being rendered useless, by the removal of the dam, the lessee thereby sustained a loss of \$3,750, or \$750 per year, for the five years of his term.

They further alleged a refusal on the part of Ragland to unite in the selection of persons to adjust the loss under the contract. And making their answer a “cross-petition and counter-claim,” they sought to have the case transferred to equity, and their loss in consequence of the removal of the mill-dam ascertained and applied in the abatement of the several notes.

The court overruled a motion of the defendants to transfer the cause to equity, and sustained a demurrer to their answer, and rendered a judgment for the debt of \$1,000 in the petition mentioned, and this appeal is prosecuted to reverse that judgment.

The facts alleged were certainly such as to entitle the defendants to an abatement of rents accruing under the contract after the removal of the mill-dam, but as we construe the contract, it did not contemplate any reduction of stipulated rents accruing before the removal of the dam. The entire amount of the note sued on was due for the use of the property before the removal of the dam, and the consideration of that note was not, therefore, affected by the subsequent impairment of the value of the use of the property, which under the contract operated from its date to reduce correspondingly the subsequently accruing rents. But it did not, in our opinion, constitute a valid defense to the note which is the foundation of this action, either legal or equitable.

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The court, therefore, properly refused to transfer the case and rightly sustained the plaintiff's demurrer to the answer.

Wherefore, the judgment is *affirmed*.

Nesbitt & Gudgell, for appellants.

Hurt, for appellees.

E. NEWMAN ET AL v. WILLIAM C. POWELL.

Deeds—Void—Infelicity of Grantor.

A deed was given a brother to the undivided one half interest in land descending to a sister, the latter of whom was proven at the time to have been irrational. The deed recited love and affection, and to carry out the wish of their father. In a subsequent suit by the grantors children to vacate same, by reason of their mother being of unsound mind, it is held, that the deed was void, as not being the deliberate act of a discrete and intelligent person.

APPEAL FROM CASEY CIRCUIT COURT.

June 3, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

In February, 1864, Elizabeth Jackson, a widow, and the mother of three adult children, with one of whom she resided in Jessamine county, being temporarily in Casey county, where she owned, by descent from her mother, an undivided interest in a tract of land then in the possession of her brother, W. C. Powell, worth about \$1,400, united in a conveyance thereof to Powell, for the expressed consideration of natural love for her brother, and the further reason that it had been the wish of the father, who had recently died, that his said son, W. C. Powell, should own said tract of land, which he, though owning but a life estate therein, had attempted to convey to said W. C. Powell.

In March, 1867, Edward Newman, the son of Mrs. Jackson,

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filed a petition in the Jessamine circuit court, suggesting that she was a lunatic, and thereupon an inquest was held, by which it was found that she was and had been of unsound mind, and a lunatic for four or five years. Said Edward Newman being appointed the committee of his mother, this suit was instituted by him to set aside said deed, mainly on the ground of the mental incapacity of the grantor when it was made, and she having died during the pendency of the action, it was revived and presented by Newman and others as her heir-at-law.

The court, on hearing the cause, dismissed the petition, and the plaintiffs have appealed to this court.

The depositions of a number of witnesses were taken by the plaintiffs in Jessamine county, and by the defendant in Casey, and their testimony is strangely conflicting as to the state of Mrs. Jackson's mind in February, 1864. In Jessamine, many facts and circumstances pertaining to her conduct were proved in corroboration of the inquest of lunacy, and the opinions of two physicians which seem conclusive of the fact that she had been of unsound mind since about the year 1862; and as it appears that she frequently visited her friends in Casey, it is difficult to conclude that the numerous relations of herself and the defendant, who have testified that her insanity did not occur until after the date of the conveyance, were wholly misinformed of facts leading to a different conclusion, which seem to have been generally known among the neighbors and acquaintances of Mrs. Jackson in the county of her residence.

On her return from Casey county, after the execution of the deed, she was irrational, as she had been before, and the inference is strong, that if the witnesses for the appellee were not grossly deceived or biased, she enjoyed but a lucid interval during her sojourn with them in Casey.

Her small interest in the land in Casey seems to have been her principal estate, which, if the deed is sustained, she, for no valuable consideration, gave to her brother, to the exclusion of her own children, on whom she seems to have been dependent, and to whom she must, in her affliction, have been an object of much solicitude and care, if not of expense. Testing the conveyance by the usual rules for determining the validity of like instruments, we are of the opinion that it ought not to stand.

Situated as Mrs. Jackson was, this conveyance seems to us to

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have been rash, improvident and unjust to her children, and if it was not the result of some fraudulent device, on the part of the appellee, which may be inferred, it ought not, we think, under all the circumstances of this case, to be upheld as the deliberate act of a discreet and intelligent person.

Wherefore, the judgment is reversed, and the cause remanded for judgment in conformity to this opinion.

Durham, Jacobs, for appellants.

FARMERS' BANK OF KY. *v.* E. H. GREEN'S EXECUTRIX. . .

Executors and Administrators—Decedents Estate—Settlement—Preferred Claims—Loss of Security.

The decedent had pledged fifty hogsheads of tobacco to secure a debt of \$6000.00. The tobacco was worth a much larger sum than that for which it was pledged, and the executrix being desirous to redeem it, and to ship it to a foreign market, drew a sterling bill of exchange on Gilliott & Co. Consignees in the city of London, for over \$8000.00 which she sold to appellant and with a part of the proceeds redeemed the tobacco. The tobacco was destroyed by fire in transit, and became a total loss to decedents estate. The bill was protested for non-payment. In the suit to settle decedents estate the appellant claimed that its debt constituted a part of the necessary expenses of administration:

Held, that a debt thus created, and apparently secured, should not be treated as a preferred debt after the loss of the security, to the injury of other creditors. It cannot be considered as a debt created in the administration of the estate.

APPEAL FROM HENDERSON CIRCUIT COURT.

April 20, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

At the death of E. W. Green, in 1865, near fifty hogheads of his tobacco were pledged to Phelps, Caldwell & Co., in Louisville, to secure a debt of \$6,000. The tobacco was worth a much larger sum than that for which it was pledged, and the executrix being

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desirous to redeem it, and to ship it to a foreign market, drew a sterling bill of exchange on Gilliott & Co., consignees, in the city of London, for over eight thousand dollars, which she sold to appellant, and with a part of the proceeds redeemed the tobacco, and consigned it to a firm of commission merchants in New York, to be shipped to said Gilliott & Co. While in New York the tobacco was consumed by fire, and through the failure of the consignee in that city, it was lost to the estate of Green. The bill drawn on Gilliott & Co. was protested for non-acceptance, doubtless on account of the failure of the tobacco to reach them, and the bill was returned.

The executrix filed her petition, and alleged that the assets of her testator were insufficient to pay the debts, and prayed the chancellor to order a sale of the real estate and to administer the assets. Appellant, in an answer and cross-suit, claimed that its debt constituted a part of the necessary expenses of administration, and as such was a preferred one and should be paid in full, while other creditors (the estate being insolvent) would have their debts paid in part. The court below adjudged that appellant's debt was not a preferred one, but stood in the same condition with the other general creditors. This appeal is prosecuted to reverse that judgment.

The evidence shows that appellant looked to the proceeds of the tobacco which was to be shipped to London, to Gilliott & Co., for the payment of the bill, not doubting that it would be redeemed when the money was advanced, and that its value was more than sufficient to secure its payment, the bank took the risk without a home acceptor, and, so far as appears, without any other name, except the drawer, regardless of the value of the residue of the testator's estate, and would have been fully protected but for the accidental destruction of the tobacco by fire.

A debt thus created, and apparently secured, should not be treated as a preferred debt after the loss of the security, and adjudged to be fully paid out of the remaining assets to the injury of other creditors. It can not be considered as a debt created necessarily in the administration of the estate.

Wherefore, the judgment is *affirmed*.

James, for appellant.

Vance, for appellee.

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ROBERT D. CHAMBERS *v.* GEORGE D. POSEY.**Contracts—Actions on—Reply—Conditions Precedent.**

The appellant brought this action on a contract for the purchase of a lot of mules from appellee for which he agreed to execute his note without alleging that he had performed his part of the contract.

Held, that the court should have instructed the jury to find for the defendant as the pleadings authorized a judgment in his favor.

APPEAL FROM HENDERSON CIRCUIT COURT.

April 24, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The admission of the appellant, in his reply to the appellee's answer and cross-petition, together with the written agreement exhibited with the reply, show conclusively that the appellant's claim to the four mules was solely denied under and by virtue of the contract made January 18, 1870, which stipulates that on that day the appellee, G. D. Posey, sold to appellant various articles of personal property for sums amounting in the aggregate to \$1,524, of which he paid down \$465, and was to give his note for the balance of \$1,059 payable twelve months thereafter, and that he did not receive the possession of the property, nor deliver or tender the note before he brought this action for the recovery of the mules. This court is of the opinion that before the plaintiff could maintain an action to recover the possession of the mules he was bound to perform his part of the agreement by giving or offering to give his note, and upon the pleadings alone the court might have properly instructed the jury to find for the defendant, as to the claim to recover the possession of the mules, and this being the extent of the verdict rendered, and the judgment of the court, it is not material or necessary to inquire whether the rulings of the court as to the evidence and instructions given and refused were correct or not; the result being as favorable to the appellant as the pleadings authorized.

Wherefore, the judgment is *affirmed*. Judge Lindsay dissenting.

Eaves, for appellant.

Vance, for appellee.

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C. L. PEYTON v. ASA CARTER.

Removal of Causes—Petition for Removal Filed—Proceedings in State Court to Cease—Failure to File Copy of Record in United States Court.

After the filing of a petition, for removal to the United States Court, properly verified, further proceedings in the State Court should cease and not be resumed until a certificate, from the Federal Court stating that the petitioner has failed to file a copy of the record in that Court, is produced.

APPEAL FROM MORGAN CIRCUIT COURT.

April 12, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

At the June term, 1867, of the Morgan circuit court this cause was, upon the petition of appellant, properly removed to the circuit court of the United States for the District of Kentucky, under the provisions of the Act of Congress, approved March 3, 1863, and amended May 11, 1866. The third section of the amendment to said act (Statutes at Large, volume 14, page 46), provides that after filing of the petition for removal properly verified, "the further proceedings in the State court shall cease, and not be resumed until a certificate under the seal of the circuit court of the United States, stating that the petitioner has failed to file copies in the said circuit court, at the next term, is procured." No such certificate having been produced in this case, it was error upon the part of the circuit court of Morgan county to proceed with the trial of the action. Wherefore the judgment must be reversed.

*Holt, for appellant.**Hazelrigg, for appellee.*

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CAMPBELL TURNPIKE CO. v. A. A. MILLER ET AL.**Lost Instruments—Oral Testimony to Prove Contents—Burden.**

Where a writing has been lost it is not improper to admit oral testimony to prove the contents, but it is incumbent upon the party proposing to prove its contents to establish with a reasonable degree of certainty what the paper did contain.

Same—Acts Done While Writing in Existence—Conclusions.

The fact that appellant permitted the vendor of appellee to build the fence where it now stands when the written grant was in existence tends very strongly to establish the conclusion that the production of the writing would have dissipated the claim of appellant.

APPEAL FROM CAMPBELL CIRCUIT COURT.

April 12, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

It seems that Marion, who owned the land of the appellees at the time of the construction of appellant's road, granted the right of way through said land in writing. The company, instead of having this written grant properly acknowledged and made a matter of public record, undertook its preservation by entrusting it to the custody of its own officers. We may safely assume from the evidence before us, that this writing has been lost, and therefore it was not improper to admit oral testimony to prove its contents. It was incumbent, however, upon the company to establish, with a reasonable degree of certainty, what the paper did contain, before the circuit court would have been authorized to conclude that said company was the owner of the land enclosed by the appellees, under and by virtue of such written grant. Considering all the evidence in the case, we are not prepared to decide that the circuit judge erred in his conclusion that it was uncertain whether or not the appellants had at any time had the right of way over the land upon which the fence of the appellees now stands. Whatever may have been the understanding or agreement at the time of the construction of the road, as to the width of the way granted, it is certain

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that for the first five miles out of Newport the space left between the fences of the land-owners on either side of the road, in very many places is now and for many years has been much less than sixty feet. The fact that the company permitted the vendor of the appellees to build the fence where it now stands, when the books of the company containing the written grant of the right of way were most probably in existence, and permitted the same to remain without question for more than ten years and until after said books were lost, are circumstances tending very strongly to establish the conclusion that the production of the written grant of Marion would wholly dissipate the claim of the appellants. We are of opinion that the judgment of the circuit court is fully sustained by the evidence, and the same is therefore affirmed.

Stevenson & Hodge, for appellant.

Webster, Hallam, for appellee.

J. H. WALKER & CO. v. TANDY WIGGLEWORTH ET AL.

Vendor and Purchaser—Purchase Money Lien—Failure to Comply With His Part of Contract—Rescission.

Appellants sold to appellees a distillery on which there was a purchase money lien which had to be discharged to operate the distillery. Appellants discharged half of this lien and appellees owed them enough to pay the balance. Held, that appellees had no right to a rescission of the contract of purchase as they could have applied the amount they owed to the discharge of the balance of the lien.

APPEAL FROM HARRISON CIRCUIT COURT.

April, 15, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

There is nothing in the record warranting the conclusion that Walker & Co. made any fraudulent representations to the appellee as to the provisions of the United States internal revenue law. Upon the contrary, it seems the latter were apprised at the time of their purchase that it was a matter of some doubt whether or not they would be licensed by the Federal government to operate the

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distillery so long as the lien in favor of Walker's vendors remained unsatisfied. Fully apprised as they were of the existence of such lien, and of the fact that one of Walker's notes would not fall due until nearly a year after their purchase, common prudence demanded that they should take the proper steps to ascertain correctly the provisions of the revenue law, and not rely upon the opinion of Walker. *Waggener v. Waggener*, 2 A. K. Marshall, 331. There being no fraud upon the part of appellants, and it not appearing that they undertook to guarantee that the appellees would be licensed to carry on the distillery, there can be but one ground upon which a rescission of the contract of sale can be sustained, and that is that Walker can not comply with the conditions of the written agreement entered into between the parties. Walker & Co. sold to appellees, and agreed with them to "transfer and relinquish their right and title unto the party of the second part the following property, namely: About two acres of land, including the distillery and other buildings on the premises formerly owned by John Poindexter, deceased, being the same purchased by the said parties of the first part at the sale on the 28th of November, 1868." This contract was executed on the 13th of February, 1869, and the appellees knew, or ought to have known, that Walker & Co. then owed \$15,000, the entire purchase price agreed by them to be given for the property, and that one-half of it would not be due until about the 15th of June, and the balance until the 1st of November thereafter. Under such circumstances, it is but fair to conclude that the Walkers expected, and had the right to expect that they would be enabled by the first payment from the appellees to pay off the last payment due from them to the commissioner from whom they bought, and the record shows that before the institution of this suit they had paid off more than one-half of the first payment due from them to the commissioner. The failure or refusal of the appellees to comply with their contract was very possibly the reason of Walker & Co. failing to make prompt payments on their purchase, and to allow the appellees to force a rescission of the contract on this account will be to permit them to take advantage of their own wrong. We are of opinion that the court should have continued the case and allowed the appellants time to procure a conveyance of the title to the property and to secure a release of the liens in favor of Harris, who paid off their bonds to the commissioner, and if it be necessary to do this, to

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ascertain the amount due from the appellees which is the cash value of the whisky they contracted to deliver at the time it should have been delivered, enforce the payment of the same, and apply so much thereof as may be necessary to the satisfaction of Harris' lien, the appellants should be allowed to amend their pleadings and set up the second payment due them and bring all necessary parties before the court, and the contract between the appellants and appellees enforced according to its spirit. Wherefore the judgment is reversed and the cause remanded for further proceedings.

Boyd, for appellant.

Trimble, Cleary & West, for appellee.

ANDREW OWENS ET AL. v. JOHN BARTLEY.**Non-Resident—Summons—Constructive Service—Bond—Judgment.**

It is erroneous to render judgment against a non-resident, defendant, constructively summoned, until the plaintiff has executed the bond required by section 441, Civil Code.

Same—Appeal—Appearance.

An absent defendant enters his appearance to the suit by an appeal from a judgment rendered against him.

APPEAL FROM PIKE CIRCUIT COURT.

April 17, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

Under *sub-section 2, section 441 of Civil Code*, it was erroneous to render judgment for appellee against the absent defendant, Owens, until he had executed a bond with sufficient surety conditioned that he would restore to appellant the property taken by the judgment in the action, provided he appeared within the time prescribed by law, and a restoration of the same should be adjudged. This requisition of the Code seems not to have been complied with, and for that reason the judgment was erroneous. The petition we regard as sufficient. The averments are not as

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direct, and positive as they might be, but if they be true the debt was due and unpaid. But as the absent defendant prosecuting this appeal, has entered his appearance, that will dispense with the bond.

But for the error indicated the judgment must be reversed and the cause remanded for further proceedings consistent herewith.

Radliffe, for appellant.

S. POTTER v. H. A. D. JENKINS.

Appeal and Error—Jurisdiction—Amount in Controversy—Judgment Reduced by Set-Off or Counter-claim.

The 16th section of the Civil Code of Practice, regulating the jurisdiction of the Court of Appeals, limits the right of a defendant, to an appeal from a judgment against him for money or personal property, to cases in which the judgment amounts to \$50.00 or more, except in cases in which the judgment is reduced below \$50.00 by a set-off or counter-claim.

APPEAL FROM WARREN CIRCUIT COURT.

April 13, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The plaintiff in this action sued to recover \$100 in damages against the appellant, for the unlawful killing of a cow. A trial resulted in a judgment for the plaintiff for \$30, and this appeal is from that judgment. The 16th section of the Civil Code of Practice, as amended, regulating the jurisdiction of this court, as heretofore and now construed, limits the right of a *defendant*, to appeal from a judgment against him for money or personal property, to cases in which the *judgment* amounts to \$50 or more, except in cases in which the judgment is reduced below \$50 by a set-off or counter-claim.

This appeal is not, therefore, within the jurisdiction of this court, consequently is dismissed.

Gorin, for appellant.

J. H. Wilkins, Mitchell, for appellee.

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J. A. J. LEE v. WM. BUTTS:

Adverse Possession—Estate in Hands of Executor Pending Litigation Over Will.

An estate in the hands of an executor will not be held adversely to the heirs or devisees of testator, but for the benefit of those who prove successful in the pending litigation over the will.

Same—Assignment of Interest in Estate—Legitimate Subject of Bargain and Sale.

The claim of Amos Wool to a portion of Katy Wool's estate which he was seeking to establish by impeaching her will, was a legitimate subject of bargain and sale.

APPEAL FROM BATH CIRCUIT COURT.

April 13, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The estate of Katy Wool, deceased, in the hands of her executor in 1863, at the time Lee bought from Amos Wool, was not held adversely to the heirs or devisees of the testator, but for the benefit of such of the litigants as might prove successful in the pending litigation. The claim of Amos Wool to a portion of Katy Wool's estate which he was seeking to establish by impeaching her will, was a legitimate subject of bargain and sale, hence the note sued on can not be said to have been given without consideration. The proof wholly fails to sustain the defense bond upon the alleged fraudulent misrepresentations as to the quantity of estate claimed by Amos Wool, but rather tends to establish that Lee knew more about this matter than the party from whom he bought.

The court did not err in excluding from the jury the power of attorney from Daniel Wool. There is nothing in the record connecting Amos with that writing, or even showing that he was aware of its existence. The court did not err to the prejudice of appellant by failing to explain to the jury the legal signification of the term "chancing bargain." The instruction as to it is written to mislead the jury in favor of Lee, by inducing them to conclude

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that it was necessary for appellee to prove that the note was executed upon some consideration, where, in law, the note itself imported a consideration, and the appellant had wholly failed to rebut this legal presumption.

Both the law and facts as presented by the record sustain the judgment, and as the court committed no error by which appellant could possibly have been prejudiced, the same is hereby affirmed.

Hurt, Apperson, for appellant.

Young, Turner, Reid, for appellee.

JOHN MILLER v. W. C. ALLEN.

Officers—Clerk—Official Act—Contradiction After Expiration of Term of Office—Ex parte Affidavit.

The official acts of an officer can only be contradicted or avoided in a proceeding to which he is made a party, and in which fraud or mistake is directly charged.

APPEAL FROM BATH CIRCUIT COURT.

April 21, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The summons, the execution of which, appellee claims had the legal effect of bringing the appellant before the court, was issued and executed on the 18th of March. The petition upon which the judgment was rendered is endorsed filed on the 19th of the same month. Taking the record for true, the summons was void, and its execution a nullity. We are not prepared to admit that the acts of the clerk whilst in office, can be contradicted by an ex parte affidavit made after his term of office expires.

The official acts of such an officer can only be contradicted, or avoided, in a proceeding to which he is made a party, and in which fraud or mistake is directly charged. We are of opinion that Miller was not before the court when the judgment against

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him was rendered. The same is therefore reversed and the cause remanded for further proceedings.

Stone, for appellant.

Turner, for appellee.

MARION LEWIS ET AL. v. REUBEN C. RATLIFF. . . .

Trespass — Original Trespasser — Conversion by Another — Damages — Joint Liability.

The party who receives property wrongfully taken by another and converts same to his own use is not a joint trespasser, and is therefore not responsible, for damages, as an original trespasser.

APPEAL FROM MORGAN CIRCUIT COURT.

April 11, 1871.

OPINION OF THE COURT BY JUDGE HARDIN :

The petition in the first paragraph alleges in effect that the defendant, Marion Lewis, wrongfully took the plaintiff's mare, and in the second paragraph that the other defendants became liable afterwards by having the mare in their possession and converting her to their use, but no joint trespass of the three defendants is alleged or proved, although there is evidence conducing to show a liability on the part of John J. Lewis under the second paragraph, and that Marion Lewis was guilty of the trespass charged in the first. It seems to us, therefore, that the second instruction given, that "If the jury believe the evidence they will find for the plaintiff against Marion Lewis and John J. Lewis the value of the mare and such damages as the plaintiff may have sustained by the wrongful taking of the same," was erroneous in making John J. Lewis liable for the damages sustained in consequence of the original trespass, as to which there was neither allegation nor proof against him.

The instruction asked by the defendants was properly refused. But for the error indicated, the judgment is reversed and the

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cause remanded for a new trial and for further proceedings not inconsistent with this opinion.

Hazelrigg, for appellant.

Cooper, for appellee.

GEO. LYNE & Co. v. M. S. FRANCEWAY & NESBIT.

Fraudulent Conveyances.

In this suit to set aside a conveyance as fraudulent, the following facts appear: Franceway was greatly embarrassed and conveyed a house and lot to his brother-in-law, Nesbit. The payment was witnessed at Franceway's request by two nephews and no one else than relatives were present. Franceway's wife was Nesbit's sister. Nesbit was not present when the deed was prepared and executed and it was lodged for record by the grantor and he retained the possession of the premises and listed same for taxation, and in this proceeding he employed and paid counsel to defend. Held, that these facts warrant the conclusion that the whole transaction was nothing more than a family arrangement intended to secure to Franceway and his wife the continued enjoyment of property and a fraud upon creditors.

APPEAL FROM HENDERSON CIRCUIT COURT.

April 18, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

It is evident that Franceway was greatly embarrassed at the time of his conveyance of the house and lot in Henderson to his brother-in-law Nesbit. The fact that the payment by Nesbit to him of the fourteen hundred dollars was witnessed at his request by two of their nephews, and that the subsequent payment of four hundred dollars on the note for eight hundred was again witnessed by one of the same nephews. And that at neither of these payments any one else than their relatives were present tends strongly to the conclusion that this transaction, seemingly so fair upon its face, was nothing more than a family arrangement intended to secure to Franceway and his wife, the latter of whom is the sister of Nesbit, the continued enjoyment of property which otherwise would have been in a very short time subjected to the payment of

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the grantor's debts, that Franceway did not retain nor use the money paid to him by Nesbit is evidenced by the fact that within less than one year after the conveyance, he could not in giving his deposition, account for more than three hundred dollars of the money. It is scarcely possible that he could have forgotten what disposition he had made of the same in so short a time. These facts considered in connection with the further facts that Nesbit was not present when the conveyance was prepared and executed and that it was lodged for record by the grantor. That he has retained possession of the premises, that the same have been listed for taxation in his name, and that this proceeding is being defended by counsel employed and paid by him, make it almost impossible to escape the conclusion that he is the real party in interest, and that Nesbit is merely holding the title to the property for his benefit. We are of opinion that the conveyance is void as to the appellants. Wherefore the judgment is reversed and the cause remanded with instructions to subject so much of the property conveyed as may be necessary to the satisfaction of their claim.

Yeaman, for appellant.

Vance, for appellee.

LOUISVILLE & NASHVILLE R. R. Co. v. GARRETT ELKIN.**Railroads—Injury to Cattle—Special Contract.**

There can be no binding special agreement by which a railroad can avoid its responsibility for the negligent injury to cattle by its trainmen.

Instructions May be Construed Together.

Instructions to a jury may be construed together so as to give the proper effect to all.

APPEAL FROM GARRARD CIRCUIT COURT.

June 23, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The jury had a right to disregard the alleged pass and consider

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the carrier's responsibility unqualified by any special contract, and, in this phase of the case, it was the duty of the officers controlling the train to know that the mule sued for was down and to have righted it without delay. And even if there was a binding special agreement imposing that care on the owner's agent, still, if the conductor knew that the mule was down, he was guilty of gross negligence in refusing the agent ample time to raise it; and, on either hypothesis, the evidence authorized the verdict, as to culpable negligence.

Had what is called the second been all the instruction given, there would have been fatal error in its pretermision of the hypothesis of the jury's belief that the death of the mule resulted from its being down. But the first and second constitute but one *alternative* instruction, and the first branch of it requiring such belief by the jury should be understood as applying to the second branch, and we presume that the court and the jury so understood.

The mule was not valued so high as the legal standard might have authorized.

And however conflicting, the evidence authorized every deduction necessary to sustain the verdict, which therefore we can not disturb.

Wherefore, the judgment is affirmed.

Dunlap, for appellant.

McKee, for appellee.

JAS. S. DIGBY v. THOS. MEFFORD.

Insane Persons—Contracts With—Overreaching—Fraud—Rescission—Partnership—Surviving Partner.

Mefford and Stafford were partners in business. Parker sold to Digby a boat belonging to the partnership, for the price of \$300.00. Mefford sued Digby for conversion of the boat alleging that Parker was insane at the time of the sale and that the boat was worth \$450.00; which allegations Digby denied. The case was submitted to the court without the intervention of a jury and it was adjudged that Parker was insane at the time of the sale to Digby, and that the boat was worth \$450.00. Held, that Mefford had no right to ask, and the court to make, a new contract with Digby and force him to keep the boat at a price he did not agree to give, as there is nothing in the case which warrants

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the conclusion that Digby was guilty of such conduct in the purchase of the boat as to render his purchase absolutely void; that if Parker was incapable of transacting business by reason of his insanity, then Mefford, as the surviving partner, was entitled to a rescission of the contract and no more.

APPEAL FROM CAMPBELL CIRCUIT COURT.

April 10, 1871.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Mefford and Parker, who were partners, were the owners of a wood boat, which, sometime in February, 1869, was sold by Parker to Digby for the agreed price of three hundred dollars, Digby paying Parker at the time of the purchase \$126.00 in cash. On the 2d of March, Mefford sued Parker on an account for work and labor done and performed for him and for money advanced for his use at his request, and alleged that he was about to fraudulently to dispose of his property, including the said wood boat owned by them as partners. An order of attachment was taken out and levied on said boat, although the same had been previously sold to Digby. The boat was appraised at the sum of two hundred dollars, and Parker gave bond on the 2d of March, 1869, conditioned that he would have the boat, or its appraised value and subject to the future orders of the court in the action in which it was attached. In May, 1869, Parker was, by a proper judicial proceeding, found to be a lunatic and committed to the asylum at Lexington, where he died in a few months thereafter. In December, 1869, his administrator consented that Mefford's suit should be revived against him, and entered his appearance thereto. On the 25th of February, 1870, Digby filed his petition asking to be made a party to this proceeding, setting up his purchase from Parker and asking that his rights under said purchase be protected. Pending this action in April, 1870, Mefford sued Digby for the conversion of the wood boat, asking judgment against him for its alleged value, \$300, and claiming that at the time the same was sold to him by Parker, the latter was insane and hence that the sale was void. Digby answered this action denying the insanity of Parker, paid into court the \$174 balance due on his purchase from Parker, and asked that Mefford and Parker's administrators

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be required to litigate as to their rights to the same. He also set up the pendency of the suit in which Mefford had previously attached the boat. The action for the conversion of the boat was submitted to the court without the intervention of a jury, and it was adjudged that Parker was insane at the time of the sale to Digby, and that the boat was worth \$450, instead of \$300, the agreed price, and a judgment was accordingly rendered against Digby for the additional sum of \$150. While we agree with the circuit judge that the weight of evidence tends to establish the insanity of Parker at the time of the sale to Digby, yet it seems to us that Mefford does not occupy a position which authorizes him to take advantage of the same. From his petition, filed in March, 1869, a few days after the sale to Digby, it is clear that he either did not regard Parker as insane, or else he was himself seeking to take advantage of his insanity. He took no steps to deprive Parker of the control of the partnership property until after he sold the boat, and then it was not upon the ground of Parker's insanity but that he was about to cheat, hinder and delay him in the collection of his claims against him by a fraudulent disposition of his property, and also of the partnership effects, a very singular charge to make against an insane man, whose very insanity rendered him incapable of committing a fraud. It appears that Parker exhibited no evidence of insanity at the time he sold the boat to Digby, and except in so far as inadequacy of price may imply fraud. There is no evidence that Digby overreached or imposed upon him in the transaction in the slightest degree. We see nothing in the case which warrants us in concluding that Digby was guilty of such conduct in the purchase of the boat as to render his purchase absolutely void and to make his conduct tortious from the beginning. If Parker was incapable of transacting business by reason of his insanity, then Mefford, as the surviving partner, was entitled to a rescission of the contract, which relief the court could have afforded him in the equity action instituted in March, 1869, in which he had attached the boat.

But he had no right to ask and the court no right to make a new contract with Digby, and force him to keep the boat at a price he had not agreed to give. It seems to us the court upon the hearing should of its own motion have transferred the ordinary action to the equity docket and consolidated it with the pending equity suit, or if Mefford objected to this, to have dismissed the same, and

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turned him over for relief to his proceeding in equity, in which case the rights of all the parties can be settled and complete justice done to all. For these reasons the judgment must be reversed and the cause remanded for further proceedings consistent herewith.

Hallam, for appellant.

Webster, for appellees.

COMMONWEALTH V. WM. CROMWELL'S ADM'R, &C.

Statutes of Limitation—Bar to Commonwealth.

The Commonwealth, having a judgment with an execution returned no property found, against Cromwell, seeks by this equitable action to subject a debt owing to appellee, Harlan, to Cromwell, its debtor, to the satisfaction of that debt, and the statute of limitation having been pleaded by appellee, the court below adjudged the debt of Harlan to Cromwell barred. Held, that whatever would bar Cromwell would bar the Commonwealth.

APPEAL FROM HICKMAN CIRCUIT COURT.

January 26, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

This is not a proceeding by appellant as judgment creditor with an execution and return of no property to set aside a fraudulent conveyance of the property of its debtor; but it is a proceeding to subject a chose in action of a debtor to its debtor, to the satisfaction of its debt. In other words the Commonwealth, having a judgment with an execution returned no property found, against Cromwell, seeks by this equitable action to subject a debt owing by appellee to Harlan to Cromwell, its debtor, to the satisfaction of that debt, and the Statute of Limitations having been pleaded by appellee, and the court having adjudged the demand or debt of Harlan to Cromwell barred, the Commonwealth has appealed. And it is insisted that time does not run against the Commonwealth. That is in some sense true. But is it applicable to this case? It is not alleged in the petition that appellee Harlan is the debtor of the Commonwealth, but Cromwell is its debtor,

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and Harlan as it alleges owes Cromwell, and it seeks to be substituted to all the rights of its debtor against Harlan.

It must be obvious from this statement that whatever would bar Cromwell, would be effectual to bar appellant; it must take the condition of Cromwell, indeed that is the very object and purpose of the suit, and if Cromwell's cause of action is barred, it must be barred.

The indebtedness of appellee if it exists at all, was by open account, and more than five years had elapsed from the accrual of the cause of action before the suit was brought, and nothing is shown to take the case out of the operation of the statute, the Court below properly adjudged the action barred. Wherefore the judgment is *affirmed*.

Rodman & Bullock, for appellant.

Lindsay, for appellee.

ELKANA BUSH ET UX v. YOUNG & FAULKNER.

Judgment by Default—Petition Insufficient—Husband and Wife—Wife's Separate Estate.

It is alleged in the petition that the debt was created for lumber used in building a house on the land of the wife, and although it is alleged that she has a separate estate, it is not alleged that the house was built on land held by her as her separate estate, nor is it alleged whether her separate estate is real or personal, or where it is located. Held, that these allegations were too vague and uncertain to support a default judgment.

APPEAL FROM LINCOLN CIRCUIT COURT.

January 15, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought on a note executed by appellants, husband and wife, and seems to seek to subject the wife's separate estate to the payment thereof. But appellees give no description of the separate property of the wife sought to be subjected. It is alleged that the debt was created for lumber used in building a

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house on the land of the wife, and although it is alleged that she has separate estate, it is not alleged that the house was built on land held by her as separate estate, nor is it alleged whether her separate estate is real or prsonal, or where it is located, or to be found.

With these vague, uncertain and insufficient allegations, the petition was taken for confessed, and the circuit judge rendered judgment for the debt, and ordered so much of Annie Bush's "*estate*" as may be necessary to pay plaintiffs' debt, interest and cost, to be sold, without designating who was to sell it, whether the master in chancery, the sheriff or whoever might take upon himself first to execute the judgment. No time, nor place, is fixed for the sale; whether it is to be made on a credit, or for cash in hand, is left to the prudent discretion of whoever may be called on, and adjudge himself worthy, and authorized to undertake to execute the judgment. But the discretion of the salesman does not stop here; he is to go out, and find what he may deem Mrs. Anna Bush's *estate*, separate or general, personal or real, and sell the same according to his own judgment of what is equitable and proper. Enough has been said to show that the judgment is erroneous, if not wholly void. Wherefore, the same is reversed, and the cause remanded, with directions to dismiss the petition as to Mrs. Bush, unless appellees should offer within reasonable time to amend the same, and for further proceedings consistent with this opinion.

Bradleys, for appellants.

S. M. JONES' ADMR. v. JAS. M. FORSYTHE.**Bills and Notes—Non Est Factum—Recognition of Obligation—Instructions.**

On a plea of non est factum, where the evidence shows that the defendant recognized his obligation after the execution of the note, the court should have instructed the jury that although they should believe from the evidence Forsythe had never signed the note, yet if they should believe from the testimony that he had, since the signature, recognized his liability on it, they should find against him.

APPEAL FROM BOYLE CIRCUIT COURT.

January 14, 1870.

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OPINION OF THE COURT BY JUDGE ROBERTSON:

This case resembles that of *Bonta v. Forsythe*, decided during the last term, the only difference in the testimony is that, in the adjudged case, there was proof that Forsythe, on the identification of the note, acknowledged to *Bonta* that he was bound by it, and that in this case no such specific admission was made to *Jones*; but the facts, as proved, conduce to show that Forsythe recognized his obligation in conversation with other persons.

In this state of case the circuit court ought to have instructed the jury, as asked, in effect, that although they should believe that Forsythe had never signed the note, yet if they should believe from the testimony that he had, since the signature, recognized his liability on it, they should find against him. The principle thus implied by the motion was established in the case of *Bonta* in which the same instruction was given and approved. See *Forsythe v. Bonta*, 5 Bush 547.

Whether the hypothetical fact would have been found by the jury, we can not know, but, as the testimony was applicable and entitled to their consideration, the court erred in refusing to give them the law.

Wherefore, the judgment is reversed and the cause remanded for a new trial.

Hardin, for appellant.

Dunlap, Durham, for appellee.

A. WILE ET UX v. SWEENEY & TAYLOR.**Judicial Sales—Purchaser—Interest on Void Sale—Sheriff's Costs and Commission.**

A purchaser at a void judicial sale has no right to interest on his purchase. The sheriff cannot collect cost or commission on such sale.

Judgments—Modification.

The Court of Appeals cannot modify a judgment at a subsequent term of the court.

Rents—Improvements and Taxes.

A purchaser at a void judicial sale who has obtained the possession of the land, should be credited by all sums paid out for taxes, repairs

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and improvements, and charged with a fair rental value of the property looking to its condition at the time taken, and not its enhanced value by reason of the improvements.

APPEAL FROM DAVIESS CIRCUIT COURT.

September 20, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

The judgment in this case is based upon the commissioner's report adjusting and settling the accounts between the parties. The questions to be determined by this court arise upon the exceptions filed by the appellant to the report. Upon an appeal heretofore taken in this case, an opinion was rendered, by which the purchaser, at the sale under the execution against Wile was allowed ten per cent interest on his purchase. This sale was declared void, and there had been no other sale of the property by which the purchaser became entitled to this interest. The sale passed no title, and the sheriff conducting the sale was entitled to no costs (*Shropshire v. Pullen*, 3 Bush 512). This court can not, however, modify a judgment of the court rendered at a previous term, although the ten per cent should not have been allowed. The commissioner's report is defective in many particulars.

The appellees have been allowed by the commissioner large sums of moneys for insurance when there is no proof showing that Caroline Wile ever authorized the insurance or was benefited by the policies in any way. These amounts should not have been allowed.

The credit given appellees for improvements is for too much. There is no proof showing that appellees paid the \$500 for repairs to which the witness alluded. The commissioner, in making an estimate of the purchase upon which this ten per cent interest is to be allowed, should exclude therefrom all the costs accruing by reason of the void sale by sheriff and commissioner.

The case should again go to the commissioner with directions not to exclude the costs in his calculation of the purchase accruing by reason of this void sale.

The appellees should be credited by all sums actually paid out by them for taxes, repairs and improvements, but no interest will be charged by them except for the taxes. They should also be

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charged with a fair rental value of the property, looking to its condition at the time the appellants took possession, and not its enhanced value by reason of the improvements if any were made. If the appellees have rented or received rents more than the fair value of the property in its condition when they received it they must account for the rents so received and the commissioner will allow interest on rents. They are liable for rent whilst they have the property in their possession or under their control. The sum of money deductive from the rent of Jones should not be allowed appellees if their object in making this deduction was to deprive Mrs. Wile of the title or possession of the property. The commissioner should hear additional proof, if offered, upon all the questions involved in his requisition. The cause is reversed, with directions to the court below to set aside the judgment and the order confirming the commissioner's report and refer the case again to the commissioner with directions to settle and adjust the accounts between the parties as herein indicated.

Bush, for appellant.

Sweeney & Stuart, for appellee.

J. A. BOYD v. J. D. STION ET AL.**Executions—Excuse for Failure to Return.**

Where the plaintiff takes an execution out of the hands of the sheriff he cannot complain on account of its not being returned.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

March 2, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The evidence authorizes the conclusion that the sheriff's failure to return the execution was caused by their being taken out of his hands by the plaintiff for the purpose of settling the accounts of Woldridge and giving him credit therefor. This was a reason-

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able ground for excuse for the failure to return the executions.
Wherefore, the judgment is affirmed.

Feland & Evans, for appellant.
Ritter, for appellees.

THOMAS LYONS ET AL. V. T. B. BALLARD.

Trover and Conversion—Failure of Jury to Comply with the Law—Court Cannot Assess Damages.

In the absence of a literal or substantial compliance with the law on the part of the jury, the court cannot assess damages.

APPEAL FROM MADISON CIRCUIT COURT.

June 14, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

It seems to this court that the verdict of the jury, finding for the plaintiff "the horse in contest if to be had, if not, then one hundred and fifty dollars in damages," was a substantial assessment of the value of the horse, as required by section 360 of the Civil Code, and the judgment was rendered in conformity to the verdict. We do not regard this as a parallel case with that of *Young v. Parsons, et al.*, 2 Metcalfe 499, wherein the absence of any literal or substantial compliance with the law on the part of the jury by assessing the value of the property, the court seems to have undertaken to do so from the evidence proved on the trial, which this court held to be unauthorized.

Wherefore, the judgment is affirmed.

Chenault & McCreary, for appellants.
Turner & Smith, for appellee.

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ROBERT COLVIN ET AL v. JAMES H. REYNOLD'S ASSIGNEE ET AL.

Executors—Administrators—Distributee—Overpayment—Motion.

Where an administrator overpays a distributee, *pendente lite*, a rule for restitution is the proper remedy.

APPEAL FROM MARION CIRCUIT COURT.

March 8, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

If the payments to the appellants of their entire demands considerably exceeded their *pro rata* portions of the distributable fund as finally reduced, they are equitably liable to restitution of the excess. And as those inadvertent payments by the administrator were made *pendente lite*, a rule for restitution was an appropriate remedy.

Wherefore, as there is no apparent error, the judgment is affirmed.

Caldwell, Rissell & A., for appellant.

Garnett, for appellees.

SOL. NESLER'S ADMR. v. H. C. SMITH.

Husband and Wife—Married Woman's Contract—Coverture Removed Before Suit—Action Confirms Contract.

Though a conveyance made by the husband and wife, be ineffectual to pass her title, her prosecution or the action after her disability of coverture was removed, is a confirmation of the contract.

APPEAL FROM HENDERSON CIRCUIT COURT.

March 2, 1870.

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OPINION OF THE COURT BY JUDGE PETERS:

This was an action in ordinary for a breach of covenant in a written contract for the exchange of lots, or parcels of ground near the city of Henderson.

At the date of the contract, appellee was a married woman, and might have then avoided the contract; but when the action was tried she was discovert, the title to the five acres of land which she contracted to convey to appellant's intestate was in her, and she and her husband seem to have joined in a conveyance to said intestate before she commenced her action. And if that conveyance was ineffectual to pass her title, her prosecution of this action after her disability of coverture was removed, is a confirmation of the contract for the exchange of lots, and she can not avoid it now.

Perceiving, therefore, no available error in the proceedings and judgment appealed from, the said judgment is affirmed.

Turner, for appellant.

L. H. MARTIN v. TRUSTEES OF KY. BAPTIST EDUCATION SOCIETY.

Appeal and Error—Variance Between Prayer and Verdict Not a Substantial Error.

An apparent variance between the prayer of the petition and the verdict of the jury, is a mere error or defect in the proceedings which does not effect the substantial rights of the defendant.

Evidence—Action, Notice of—Corporation.

A stipulation in relation to the certificate of the chairman of an executive committee of the trustees, held as relating to the requisite evidence to authorize a recovery, and not as a means of giving notice to the obligor therein, preliminary to a right of action.

APPEAL FROM WOODFORD CIRCUIT COURT.

June 21, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

It is argued for the appellant on several grounds that the judgment is erroneous and should be reversed; but neither ground is

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deemed available.

1. It is contended that the verdict of the jury is not sustained by the evidence. Whether the witnesses as to handwriting disclosed such knowledge on that subject as to entitle their testimony to consideration, or not, we think the facts proved by Bohannon were evidence from which the jury might have found the note to be the act and deed of the defendant.

2. As to the stipulation in relation to the certificate of the chairman of the executive committee of the trustees as evidence, we construe it as relating to the requisite evidence to authorize a recovery, and not as a means of giving notice to the obligor, preliminary to a right of action.

3. Though there is an apparent variance between the prayer of the petition and the verdict of the jury, as the contract set out in the petition shows in connection with the other facts alleged and proved, that the plaintiff was entitled to the interest on the several installments of the debt which the jury found and the court adjudged in the aggregate, we regard the irregularity as a mere error or defect in the proceedings which did not affect the substantial rights of the defendant, and did not constitute a ground for setting aside the judgment. (Civil Code of Practice, section 161.)

Wherefore, the judgment is affirmed.

Wallace, for appellant.

Marshall & McLeod, for appellee.

ELIZA COLLIER ET AL. v. T. I. C. PATRICK.

Husband and Wife—Coverture—Conveyance of Wife's Land Must be Executed in Compliance With the Statute—Acquiescence in Act of Husband—Estoppel—Fraud—Equity.

The appellants were both feme covert when the sale of their land took place. Neither their execution of the power of attorney, nor their mere acquiescence in the acts of their husbands can have the effect of estopping them from asserting title as against their husband's vendees. Feme coverts can only divest themselves of their title to real estate in the mode prescribed by law, and to make informal or imperfect conveyances operate against them as estoppels would break down all the safe guards by which the law surrounds them. Held, that whilst married

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women cannot be allowed to take advantage of their coverture to commit frauds, they can even in a court of equity, avoid a conveyance not made and executed in substantial compliance with the statute.

Vendor and Purchaser—Defective Conveyance—Acquiescence—Adverse Possession—Limitation.

When land is sold under a defective power of attorney, and the vendor acquiesces in the transaction for more than fifteen years, during all of which time the vendee has had the actual possession, the Statute of Limitation presents a complete bar.

APPEAL FROM M'LEAN CIRCUIT COURT.

April 24, 1871.

OPINION OF THE COURT BY JUDGE LINDSEY:

So far as the appellants, Eliza Collier and Ellen Jones, are concerned, their title to their respective interests in the tract of land of which their father died seized, could not have passed to Kerrick by the deed under which he claims. Whatever authority Baker may have had to act for them in the sale and conveyance of their inheritance, it is clear he did not exercise it in making this deed. He did not pretend to convey either for them or their co-appellants, Lofton and David Jones, Jr.

It does not appear that either of these four appellants were parties to the actions in the Daviess circuit court of Fleming and others v. Jones and David Jones, Sr., nor that they or either of them received any portion of the proceeds of the land distributed under the judgment of that court in said actions. Hence, so far as they are concerned, the proceedings in those cases can not be regarded as a ratification by them of the sale of the land previously made by Baker to Jos. D. Collier. It seems, however, that James and David Jones, Sr., had executed the power of attorney to Baker and that their interests in the proceeds of the lands were appropriated to the payment of their debts, that they acquiesced in these transactions for from fifteen to seventeen years, during all of which time Kerrick and his vendor, Collier, have had actual possession of the land claiming it as against them. Under such circumstances we are of opinion that the statute of limitation bars their right to prosecute this action, and that so far as they are concerned the petition was properly dismissed. As to Lofton and David Jones,

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Jr., the record does not develop when they became of age, nor when the statute commenced running against them, nor whether or not their father, Phillip, was alive at the time Baker sold the land to Collier. It is certain, however, that the legal title to their father's interest still remains in them, and that they are authorized to recover unless they are barred by limitation. If, however, their ancestor assented to the sale to Collier, and he or his personal representative received his share of the proceeds of the sale, they should be required to refund the same with legal interest against which and improvements rents may be set-off before Kerrick is compelled to surrender the possession of the land to them, and to secure the judgment of such amount he holds a lien upon their portion of the land.

Mrs. Ellen Jones and Eliza Collier were both feme covert when all these transactions took place. Neither their execution of the power of attorney to Baker, nor their mere acquiescence in the acts of their husbands can have the effect of estopping them from asserting title as against their husband's vendee. Females covert can only divest themselves of their title to real estate in the mode prescribed by law, and to make informal or imperfect conveyances operate against them as estoppels would break down all the safeguards by which the law intends to surround them.

The case of *Connelly v. Brantsler* is essentially different from that under consideration. It does not appear that either Mrs. Collier or Eliza Jones were present, or in any manner directly or indirectly encouraged or solicited either Collier or Kerrick to buy. Their power of attorney to Baker does not appear either to have been acknowledged or recorded, and whilst married women can not be allowed to take advantage of their coverture to commit fraud, it has always been held that they could, even in a court of equity, avoid a conveyance not made and executed in substantial compliance with the statute.

Nor were those two appellants bound to sue within three years after becoming discoverd. The deed of Baker passed the estate of their respective husbands in the land, which was a life estate, consequently Kerrick's holding was friendly to their title until the death of their said husbands, even if it became adverse thereafter.

For these reasons the judgment dismissing the petition as to Eliza Collier, Ellen Jones and Lofton and David Jones, Jr., is reversed, and the cause remanded for further proceedings con-

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sistent with this opinion. The parties should be allowed reasonable time within which to make such further preparation as may be necessary to enable the court to do complete justice to all the parties litigant.

Owen, Eaves, Boyd, for appellant.
Sweeney & Stuart, for appellee.

DANIEL GARD v. HENRY GREEN.**Bills and Notes—Verbal Assignment—Warranty—Petition—Demurrer.**

A petition contained no averment of any agreement, or undertaking in writing or parol, by the defendant that he would warrant the solvency of Mallory's estate, the alleged "Verbal Assignment" importing no more than a mere sale and delivery of the note, without assigning it. Held, that a verbal assignment of a note devolves no responsibility on the seller, for the solvency of the obligor in the debt.

Same.

The petition must allege facts showing diligence in the prosecuting of the claim against the maker, as a pre-requisite to a suit against the assignor.

APPEAL FROM SCOTT CIRCUIT COURT.

June 15, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The petition contains no averment of any agreement or undertaking in writing, or parol by the defendant that he would warrant the solvency of Mallory's estate, the alleged "verbal assignment" importing no more than a mere sale and delivery of the note, without assigning it, which has been repeatedly held to devolve no responsibility on the seller, for the solvency of the obligor in the debt, without some express contract to that effect. Nor does the petition allege such diligence in prosecuting the claim against Mallory's estate as was necessary as a prerequisite to the suit for recourse against an assignor.

Whether more than fifteen per cent. of the debt could have

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been realized, should have been ascertained by judicial proceedings, and the mere presentation of the claim in a suit to settle Mallory's estate, without any conclusive result was not sufficient to establish a right of action against the defendant, if he was otherwise bound as assignor of the note.

Wherefore the judgment is reversed and the cause remanded with directions to sustain the demurrer to the petition, and for other proceedings not inconsistent with this opinion.

Stevenson, for appellant.

Cantrill for appellee.

J. A. CRUELLE, &C. v. B. SIMON, &C.**New Trial—Credits Allowed by Decree of Court—Injunction.**

Credits, pretermitted in a first, and allowed in a second decree, sufficient to sustain a petition for re-hearing, and an injunction, until such credits had been adjudged and ordered by the court.

Costs.

Such proceeding, entitles the appellant to his costs, on a supplemental proceeding.

Judicial Sales.

The first sale, under order of court, must be set aside, before a second sale is ordered.

APPEAL FROM PENDLETON CIRCUIT COURT.

March 1, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The imputed fraud in obtaining the original judgment subjecting the land to sale is not sufficiently established. But the last decree for costs, damages and sale, now under revision, must be reversed on the following grounds:

1. The title to the credits, permitted in the first and allowed in the last decree, sustained the petition for a rehearing, and the injunction also, until those credits *had been adjudged and ordered by the court.*

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This entitled the appellants to costs on this supplemental proceeding, and consequently the judgment subjecting them to the costs was erroneous, and the decree for damages was improvident and unreasonably stringent.

2. The sale, as reported under the first decree for sale, might embarrass the sale last ordered, reduce the proceeds of it, and result in ulterior litigation. The circuit court ought therefore to have adjusted all questions as to the reported sale before ordering another sale.

Wherefore the judgment now appealed from is reversed, and the cause remanded for a decree in favor of the appellants for costs, and either a confirmation or vacation of the reported sale as may, by further proceedings, be found to be right, and then for a final decree accordingly.

Ward, Lindsey, for appellants.

Trimble, for appellees.

GEO. LEE & WIFE v. WM. ARBEGUST, &C.**Wills—Antipathy Toward Children by Testator.**

A petition attacking a will, charged that the mind of the testator was not self-poised and deliberate, but warped, biased and misled by an insane antipathy as to one of his children; but contained no allegation that the testator was so far insane as to render him incapable of transacting his usual business. Held, in the absence of conflicting evidence, not to be sufficient to overcome the validity of the will.

APPEAL FROM JEFFERSON CIRCUIT COURT. C. P. DIV.

May 24, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The contestants of the will of John Arbegust do not pretend that the testator was at any time so far insane as to render him incapable of transacting his usual and ordinary business in a sensible, discreet and prudent manner, nor of taking a survey of his estate, and of the relationship existing between himself, his family and the world, but that as to his daughter Anna R. Lee

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his mind was not self poised and deliberate, but warped, biased and misled, by an insane antipathy to her, to such an extent that he could not take a natural view of the relationship, she as his daughter bore to him.

The evidence presented by the record conduces to establish that John Arbegust was a man possessing naturally a strong, active and vigorous mind; that he was a man of considerable culture, nervous, energetic, self-willed and dictatorial; that his anger was easily aroused, his prejudices strong, and his temper unforgiving; that he was violent when thwarted, and abusive to those who questioned his motives or doubted the propriety of the course adopted by him in the transaction of his business or the management of his family affairs: notwithstanding all this, he was a just and upright man, and one whose conclusions were generally not only defensible, but correct and proper, and however much his mind may sometimes have been biased and controlled by prejudice or passion, he, under all circumstances, and at all times, acted from a solemn conviction of right and duty.

It is difficult to conclude that such a man would become so completely enslaved by an unfounded, unnatural and insane antipathy to a dutiful and affectionate daughter, as to be unable after years of conscientious deliberation to free himself therefrom. It seems that John Arbegust became incensed at the husband of Mrs. Lee in 1859. His will was written by himself in 1864, and he did not die until the beginning of the year 1869. During this long period he was a rational, intelligent and discreet man, in the management of his business affairs. He did not forget his son-in-law for defying his will and disregarding his wishes and advice, nor restore to his affection the wife of the man who thus refused to conform to his sense of right and duty, although she was his daughter, but there is nothing in the record justifying the conclusion, that during this time, he was hostile to, or entertained feelings or antipathy towards either his daughter or her husband.

He was doubtless determined that the son-in-law who would not conform to his ultra notions of filial obedience, should not be a recipient of his bounty, and he felt, in view of the independent circumstances of his daughter's husband, that he could in the disposition of his property, execute his "determinations" in this regard, without the slightest danger of exposing his daughter or her children to want or poverty in the future.

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His will does not indicate that he felt towards Mrs. Lee the slightest antipathy. She is the first of his children mentioned therein, and the language used shows that notwithstanding his stern "determinations" and his imperious and unbending will, he could not resist so far yielding to his parental feelings, or to devise to her an amount sufficient to convince her that she was still recognized as a daughter.

The will was written altogether by the testator, in his natural and characteristic manner. Its provisions, if not in exact accordance with our view of parental tenderness and justice, are sensible and judicious. The evidence in our opinion fails to overcome the legal presumption of sanity upon the part of the testator. We therefore conclude that the will was properly probated by the Jefferson County Court; that the finding of the jury upon the trial of the issue in the court of common pleas is true, and we affirm the judgment of said court in the premises.

Pirtle & Carult, for appellant.

Bullock, Caldwell, Arbegust, for appellees.

MILTON YARNALL v. D. M. WHITE, &c.**Appeal and Error—Estoppel.**

The errors, if any exist, in the judgment in favor of the appellant against White, which is not appealed from, do not result from anything in the pleadings or preparation of the case, which could operate to estop the appellant from seeking a reversal of the judgment, so far as it directs the payment of the claim of Wiggleworth against the appellant.

Vendor and Purchaser—Title Bond—Payment—Warranty Deed.

The vendor must present a good and sufficient deed in compliance with his title bond before he can enforce the payment of the purchase money.

APPEAL FROM HARRISON CIRCUIT COURT.

June 22, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The errors, if any exist, in the judgment in favor of the appellant against White, which is not appealed from, do not result

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from anything in the pleadings or preparation of the case, which could operate to estop the appellant from seeking in this court a reversal of the judgment, so far as it directs the payment of the claim of Wigglesworth against the appellant, out of the amount adjudged against White. The appellant resisted payment of the note for \$800, because of alleged inability of C. Yarnall to convey the title in compliance with his bond, and his express stipulation that no part of the last payment for which that note was given, should be made, until a warranty deed should be made in compliance with C. Yarnall's bonds, which was not done, nor facts disclosed showing that it was in the power of the court to cause it to be done. The answer of appellant further set up in the garnishee suit of Hodges as creating a lien, or *lis pendens* as to \$120 of the \$500 debt in appellants hands before the assignment of the note to Wigglesworth. The assignment is not dated, and Wigglesworth has failed to allege or prove the date which would have shown whether or not the assignment and transfer of the note preceded the service or proof in the suit of Hodges; but he relied mainly on the alleged ground that he accepted the assignment of the note without knowledge of the pendency of the suit of Hodges, which does not appear to have been disposed of and may terminate in a judgment against the appellant.

We are of the opinion that for both the reasons indicated, the court erred in adjudging, on the case as presented, that the claim of Wigglesworth should be paid; but on the return of the cause further preparation will be allowed.

Wherefore the judgment in favor of Wigglesworth, is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Trimble, for appellant.

Cleary & West, for appellee.

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URIAH SHINKLE v. CITY OF COVINGTON.

Damages—Wharfage Regulations—Instructions.

It is error to submit to the jury, by instructions, in an action for damages, whether a boat of the plaintiff was moored to defendants wharf "under the wharfage regulations established by the defendant," without informing the jury what those regulations were.

APPEAL FROM KENTON CIRCUIT COURT.

June 8, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

We perceive no valid objection to either of the two instructions which were asked for plaintiff, and refused by the court, and the error thus committed was not remedied by the action of the court in giving other instructions.

The first instruction given by the court was erroneous in submitting to the jury the question whether the boat of the plaintiff was moored to the defendant's wharf, "under the wharfage regulations established by the defendant," without informing the jury what those regulations were. It was also liable to objection as involved, by reference to particular cause of peril to boats moored at the defendant's wharf.

We are also of the opinion that the court might properly have granted a new trial on the ground of newly discovered evidence.

Wherefore the judgment is reversed and the cause remanded for a new trial consistent with this opinion.

Fisks, for appellant.

Baker & Athey, for appellee.

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LOUISVILLE & NASHVILLE R. R. Co. v. C. W. CLARK.

Railroads—Killing Stock—Burden of Proof.

While the onus was on the appellant, it offered no evidence to show how the mule was killed or why. The jury had the right to infer from the facts proven by appellee, that ordinary care might have avoided the accident.

APPEAL FROM WARREN CIRCUIT COURT.

January 25, 1871.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The instructions to the jury, though somewhat plethoric are yet substantially as favorable to the appellant as it could reasonably ask.

And, while the *onus* was on the appellant, it offered no evidence to show how the mule was killed or why. The jury had a right therefore to infer from the facts proved by the appellees that ordinary care might have avoided the accident of running over the mule.

We cannot say that the verdict was either unauthorized or exorbitant.

Wherefore the judgment is affirmed.

Underwood, for appellant.

BRANNIN, SUMMERS & Co. v. JOHN O. ROSS, & Co.**Evidence—Bills and Notes—Debt of Different Character.**

This action was founded on the alleged non-payment of a bill of exchange drawn by Ross and accepted by Burk. Held, that proof of a different debt was not competent.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

June 1, 1870.

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OPINION OF THE COURT BY JUDGE PETERS: .

J. J. Ross was not discharged from his liability to appellants for the debt sued on by his proceeding in bankruptcy, the release executed by Burks to him did not release his obligation to them, it only released him from his liability to Burks, but appellant's remedy against both was the same after as before the release, and we see no error in admitting him to testify for Burks—he could not thereby benefit himself.

The first instruction by the court, on its own motion, was hypothicated on evidence conducing to sustain it, and was not abstract. The next one is substantially the same as asked by appellants in the second one they presented, and obviated an error which might otherwise have operated prejudicial to them. The third one asked by them was clearly erroneous, because according to it the jury would have been told to find for appellants if they believed Ross was indebted to them whether appellee was bound or not for such indebtedness.

As to the fourth instruction, asked by appellants and refused, their allegations were insufficient, even if the evidence had authorized it. Their action was founded on the alleged non-payment of *a bill of exchange* of date May 25, 1867, for \$2,500 drawn by Ross, and accepted by Burks, and without additional allegations, proof of an indebtedness on a different consideration, or a further indebtedness, was not competent, and a judgment without sufficient allegations could not be sustained.

Without expressing any opinion as to the preponderance of the evidence, it is sufficient to say it is conflicting, certainly not so decidedly in favor of appellants as to authorize this court to set aside the judgment on that account.

Judgment affirmed.

Thompson, for appellants.

Saunders & Eastin, for appellees.

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ALLAN GILMORE v. ALFRED HOSKINS.

Bills and Notes—Assignment—Assignor Responsible to Immediate Assignee.

Where a party is liable as assignor, his responsibility is to his immediate assignee and can only be enforced through him.

APPEAL FROM DAVIESS CIRCUIT COURT.

March 2, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The demurrer of the plaintiff, filed to the answer, having been applied to the petition, and sustained, the enquiry presented on this appeal, is whether the petition was sufficient either to authorize a personal judgment, or an enforcement of the alleged lien. If the appellee was liable as assignor, his responsibility was to Phillips, his immediate assignee, and could only be enforced through him. And if by the failure of the consideration of the assignments to Phillips, a lien resulted in his favor on the land for which they were made, the right of action to enforce it was transferred by the subsequent assignment, so as to authorize a judgment in this suit without bringing Phillips before the court, as might be the case when the *notes* of a purchaser bearing a lien are transferred by successive assignments.

The demurrer was therefore properly sustained to the petition. Wherefore the judgment is affirmed.

Sweeney & Stuart, for appellant.

Ray & Hardin, for appellee.

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JOHN H. MURRAY, &C. v. JAMES M. DEBERY, &C.

Pleadings—Judgment for Amount Claimed Only—Variance Between Amount Claimed, and Proof.

Where there is a variance between the amount claimed in a petition to have been paid, and the actual amount proved to have been paid, the amount in the petition being less than the amount proved, the petition alone will govern.

APPEAL FROM ALLEN CIRCUIT COURT.

April 25, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought in the name of James M. Debery, and of the Commonwealth for his use against James H. Murray and his sureties on his official bond as sheriff of Allen county executed the 12th of January 1863.

After alleging that said Murray had been duly elected sheriff of said county, that he had executed a covenant with E. C. Moore and others as his sureties as required by law and that he had entered upon the duties of the office, appellees allege that said Murray had not by himself and deputies well, and truly discharged all the obligations required of him by law as sheriff of Allen county, and then the breaches are assigned as follows: that on the day of, 1863, there came to the hands of said John H. Murray as sheriff as aforesaid quite a number of executions for considerable sums against appellee Debery, which are set forth in the petition, but need not be recited in this opinion, the whole of them as alleged amounted to the sum of \$6337.12.

And it is then alleged, that at various times and places while said Murray was acting as sheriff as aforesaid, appellee Debery paid to him and his deputies divers sums of money as payments on said debts, and took receipts for the sums so paid, which he files as parts of his petition, except that for the sum of \$516.79. He avers he has no receipt; that the gross sum paid on said debts by said Debery amounted to \$7,211.05, making the sum of eight hundred and seventy-three dollars and ninety-three cents, more than he was bound to pay, and than said sheriff had any legal

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authority to collect, or was necessary to satisfy, and pay said debts.

That having full confidence in the honesty and integrity of said Murray, Debery says he paid but little attention to how much he paid, and whenever Murray would call on him for money he would pay to the extent of his ability. Murray still representing to him that there was a balance due on said writs or *fifa* in his hands; that after he went out of office appellee avers he was forced by execution to pay H. R. and T. H. Hagerman, one hundred and forty-six dollars and eighty-two cents, and to pay the bank of Kentucky six hundred and ninety-four dollars and seventy-eight cents, because appellant Murray failed to enter credits on executions in favor of said parties in his hands while he was sheriff as aforesaid, the money having been paid to him by said Debery as is alleged; that the amount he was subsequently compelled to pay was \$841.60. When he had paid to Murray when executions in favor of said parties for said debts were in his hands as sheriff \$873.93 more than sufficient to have satisfied the balance on said executions, and concludes with an averment that appellants are indebted to him in the sum of \$1715.13, which is arrived at by adding the \$873.93, which is alleged to have been paid to Murray, to the \$841.60, which it is alleged he has been coerced to pay since on the executions of Hagermans, and the Bank of Kentucky and prays judgment for \$1,715.13.

The alleged indebtedness is controverted by the answers, and upon a reference of the case to the master, who reports that from receipts filed and the admission of Murray of the payment of \$125 of date the 16th of March, 1865, it appears that Debery had paid to Murray and his deputies the sum of \$6,844.26 and that they had credited divers executions in their hands against Debery in the aggregate with \$7,368.14, and in that state of the accounts Debery would be indebted to Murray in the sum of \$523.88. But that in addition to the \$6,844.26 Debery claims that he paid off the amount of an execution in favor of George D. Read. And one in favor of the Southern Bank of Kentucky, the two making \$1,198.19, and if that be true (as to which however the master expresses no opinion) then Murray would owe Debery \$647.31. He adds however that upon examination he finds the credits given by Murray up to and including the Southern

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Bank debt exceeded all the payments claimed to have been made by Debery \$208.44.

Upon this report and the evidence the court below rendered judgment in favor of Debery against Murray and two of his sureties Moore and Calvert for \$447.19 with interest from the 18th of June 1869 till paid, and against Murray alone for \$227.12, this last sum being the amount of the Read debt paid to Murray before January 1863 when the said sureties executed the covenant sued on. And the defendants prosecute this appeal.

The evidence leaves the true state of the accounts between the parties in doubt, and perplexity.

The list of payments claimed by Debery, and admitted by Murray as proved by Travelstead, amounts in the aggregate to \$7,211.65, and that includes \$216.65, the Read debt, and is erroneous in charging Murray with a payment as of date 13th of April, 1863, of \$400, which the witness proves to be erroneous, and that instead of \$400, it should be \$40 only, making an error against Murray of \$260. And in that list no credits are allowed for his commissions, besides a part of those payments were made in depreciated paper and the discount was not entered on that list, so that the credits on that list on a proper adjustment would be reduced to less than seven thousand dollars.

Again whether the money paid by Anthony to Murray on the debt to the Southern Bank was credited to Debery is left in some doubt.

Harris proves in the spring of 1867, and afterwards he had several conversations with Debery in relation to how the accounts stood between himself and Murray, these conversations being induced because he had paid money as the surety of Murray, and was then bound as his surety for other debts of some magnitude, and that in all these conversations Debery told him he thought he owed Murray from four to seven hundred dollars.

But if we look to the petition of appellees we find it distinctly alleged after referring to, and enumerating the specific executions against Debery in the hands of Murray, sheriff as aforesaid, that the aggregate amount of said debts, interest, and costs included was \$6337.12, and that at various times and places Debery paid to Murray and his deputies divers sums of money for all of which payments he took receipts except for the sum of \$516.79 and the whole of the payments as claimed amounted to \$7,211.05, while the commissioner's report shows that Murray actually paid

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out for Debery \$7,368.16 showing an overpayment by Murray of \$157.09.

Debery cannot be entitled to credit for more than he claims in his petition to have paid, and as the sum thus claimed is shown not to be as much as Murray had paid out for him, he, on the cross-petition of Moore and Calvert should have been adjudged to pay them that balance of \$157.09.

Wherefore the judgment is *reversed* and the cause remanded to render judgment in favor of appellants Moore and Calvert for the sum of \$157.09 against Debery and for further proceedings consistent with this opinion.

Mulligan, for appellant.

Gatewood, for appellee.

ALEX LUCAS, ADMR. v. MALVINA TAYLOR.

Appeal and Error—Successful Party Appealing Must Pay Cost.

Where the successful party appeals alone he must pay the cost of the appeal on the reversal of the case.

APPEAL FROM SCOTT CIRCUIT COURT.

June 15, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

As the appellant in whose favor the judgment in this case was rendered seeks by this appeal to reverse it because it was rendered before the infant defendants had answered by guardian *ad litem*, and the judgment against them in that state of the case was unauthorized, the same is reversed, and the cause remanded, with directions to set aside said judgment, and for further proceedings consistent with the rights of the parties. But appellant must pay the costs of this appeal.

Shepherd, for appellant.

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W. T. DAVIS v. S. P. DEHAVEN.

Bills and Notes—Assignment—Payment Before Notice—Instructions.

An instruction, that, "If the payments were made by appellant before the notes were in fact transferred or assigned or before notice of the transfer and assignment; he is entitled to credit for such payments," held, proper.

APPEAL FROM MERCER CIRCUIT COURT.

June 3, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

In the former opinion of this court in this case, it was decided that 'if the payments were made by appellant and his co-obligor before the note was in fact transferred to Job Dean and by him assigned to appellee or before they had notice of such transfer and assignment, they were entitled to credit for such payments.' The single instruction which was given at the instance of the defendant was in conformity to the above proposition of law. It appears that two instructions were asked by the plaintiff; one of them was given, and the other is not in this record. It does not therefore appear that any error was committed as to instructions. The only other question is as to the competency of M. B. Dehaven as a witness for the defendant. He was not a party, and we do not perceive in the fact that he proves a payment of the debt to him, under what both he and the obligors had a right to regard as sufficient authority, that he was in any way interested in the result of this suit.

Wherefore the judgment is affirmed.

Polk, for appellant.

Thompsons, for appellee.

Opinion of the Court.

W. P. WADE *v.* JAMES WILLIAMS.**Contract—Parol Agreement Binding.**

W. a remote assignee of Wade, made a parol agreement that if a sale bond, taken by a sheriff in satisfaction of a judgment of Wade, was quashed, and Wade was compelled to refund any part of same, that he (W.) would pay the same without suit to avoid costs and further litigation. Held, that the promise was founded upon a sufficient consideration, and binding upon W.

APPEAL FROM MARION CIRCUIT COURT.

October 14, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

Although Wade was not the immediate assignee of Williams, still he was invested with all the rights of Robards to whom the note was assigned. And Williams was ultimately liable to him on the assignment, in case the note could not be collected by the use of legal diligence. Whilst presuming this legal diligence, Williams voluntarily promised that in case the sale bonds, taken by the sheriff in satisfaction of Wade's judgment were quashed, and he was compelled to refund any part of the money received on the same, that he (Williams) would pay him the money without suit, as he did not wish to be put to costs about it. The bonds were quashed and Wade was compelled to refund a portion of the money collected. And this action is prosecuted to compel Williams to perform his said agreement. We hold that the promise was founded upon a sufficient consideration. Williams was both morally and legally bound to Wade on the assignment, he could dispense with the diligence required of Wade by the law if he chose, and he did so, as he said, to save costs. His promise doubtless lulled Wade into fancied security and prevented him from attaching the funds of H. P. Crowder in the hands of the commissioner. Williams should not now be allowed to take advantage of Wade's failure to do what he agreed he would not require him to do.

For these reasons the judgment of the court below, dismissing

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Wade's petition is reversed, and the cause remanded for further proceedings consistent with this opinion.

Harrison, for appellant.

TURNER & NETHERLAND v. JOHN BARRETT.

Lien—Reservation in Deed—When Does Not Constitute.

A reservation in a deed of "for and in consideration of one dollar, and twenty-five cents per acre, secured to be paid," and "a lien is reserved to secure the purchase money," and notes for a different total, and bearing different dates, held not to constitute a lien for the purchase money.

APPEAL FROM TAYLOR CIRCUIT COURT.

October 25, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

This suit in equity was brought by John Barrett as assignee of William Barrett, on the 12th of September, 1868, against A. H. DeWitt. On three notes executed the 1st of March, 1852, by said DeWitt to William Barrett. One for sixty-two dollars and twenty-five cents, due the first of March, 1853. One for sixty-two dollars, due the last of March, 1854, and one for sixty-two dollars and eighty-eight cents, due last of March, 1855.

In the original petition it is alleged that said notes were executed for the purchase price of a tract of land in Taylor county, containing about 149 acres, sold to him by said W. Barrett, about the time the notes were executed, and conveyed to him on the 15th of March, 1852, and the deed is referred to and made part of the petition. It is also alleged that a lien is retained in the deed on the land to secure the purchase money. And judgment is prayed for the amount of said notes, and for an enforcement of the alleged lien, and a sale of land to pay the amount claimed.

DeWitt in his answer pleaded that said notes had been paid off, that as early as the 21st of June, 1856, he had a settlement with William Barrett, when he paid off the principal and interest of said notes, except sixty-four dollars and eighty-eight cents, and then executed his note to William Barrett for that sum, due one

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day after date, which note he afterwards paid and took up, and he files it as a part of his answer, endorsed "*pd.*," that when he executed the last named note to Barrett he said he did not have the three notes with him, but he would at a future time deliver them up, or would cancel them, which he failed to do.

He further stated that he had, long after the land was conveyed to him, sold and conveyed it to Turner & Netherland who had fully paid him for it, and were then the owners and in possession of it, and makes a copy of his deed to them a part of his answer.

By an amended petition, filed 15th of October, 1868, Turner & Netherland were made defendants to the suit, and process sued out against them on the 17th of February, 1869, was executed the 10th of March following.

And in their answer they state they purchased the land from DeWitt for a valuable consideration paid down, and took a conveyance from him without notice of any claims for a lien by his vendor; deny that there was any lien on the land when they purchased, and plead limitations as a bar to the action. And also that the purchase money had all been paid. The relief sought was granted by the court below, and the defendants in that court have appealed.

The deed recites that about 149 acres were therein conveyed, "for' and in consideration of one dollar and twenty-five cents per acre, secured to be paid," but how the purchase money was secured, or when to be paid, is not stated, although at the close of the deed a lien is reserved on the land for the purchase money.

The notes sued on and the deed bear different dates, they are not alluded to in the deed, and when it was executed they were not in existence, therefore no lien could have been retained to secure their payment, and from the recitals in the deed the legal presumption would be that the money was due at its date, and had been paid long before the land was conveyed to appellants, Turner and Netherland, which was more than fourteen years after the conveyance was made to their vendor, and nearly seventeen years before they were sued in this action.

Besides, DeWitt's deposition was taken and read on the trial without objection on behalf of Turner and Netherland, and he proves that he had paid all the purchase money before this suit was instituted, that he and Barrett, on the 21st of June, 1856, had a settlement, when he paid him what money he had, and executed to him his note for \$64.88, due one day after date, for

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the residue of said notes, which last named he had since paid, and that note is produced marked "pd" and the body of it proved to have been written by William Barrett. And there is no evidence that there had ever been any other dealings and transactions between the parties for which the sixty-four dollar note could have been given.

It is clear therefore, that there could have been no lien on the land for any of the purchase money, if in fact any remained unpaid, and from the lapse of time between the maturity of the notes and the institution of the suit, connected with other circumstances, a presumption arises that the whole of the purchase money was paid.

Wherefore the judgment is reversed and the cause is remanded with directions for further proceedings consistent herewith.

Montague & Netherland, for appellants.
Chelf, for appellee.

JOHN WANDLING v. J. W. KENNEDY, BY &C.**Infants—Right to Vacate or Modify Judgments.**

Under the provisions of subsection 8, section 579, Civil Code, an infant defendant has the same right before, as after attaining his majority, to prosecute an action to vacate or modify any erroneous judgment that may have been rendered against him.

Infants—Appointment of Guardian Ad Litem—Service.

The appointment of a guardian ad litem on the day a warning order is issued against an infant, under Civil Code, section 56, is erroneous. The appointment can only be made, after service of process, actual or constructive.

Same—Vendor and Purchaser—Void Sale.

A purchaser of property at a void judicial sale of an infants property, will not be prejudicial by a vacation of said sale, the purchase money having been secured only by a lien on the property.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 21, 1870.

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OPINION OF THE COURT BY JUDGE LINDSAY:

Under the provisions of sub-division 8, section 579, Civil Code, an infant defendant has the same right before as after attaining his majority to prosecute an action to vacate or modify any erroneous judgment that may have been rendered against him. *Newland v. Gentry*, 18 B. Monroe, 670. It appears from the record of the suit of *Moorman and others v. Kentucky and others*, that the guardian *ad litem* was appointed for the infant defendant James Kennedy on the 23d of April, 1860, the same day upon which the warning order was taken out against him. Section 56 Civil Code provides that a guardian *ad litem* can not be appointed until after service of summons, either actual or constructive. It further appears that no suitable person was appointed by the court to take care of the interest of said infant, either before or at the time the house and lot in Owensboro was adjudged to be sold.

These errors were, in our opinion, sufficient to authorize the court to vacate the judgment in said action, in so far as it affected the interests of said infant, and as the purchase money due him under the sale has not been paid, but still retains a lien upon the house and lot, the defendants Wandling are in no wise injured, by its vacation. Their title, obtained from the Moormans and Johnson, all that they have paid for remains undisturbed, and this judgment of course releases them from the payment of any amount to Kennedy.

Judgment affirmed.

Sweeney & Stuart, for appellant.

Ray & Hardin, for appellees.

CLINTON GRIFFITH, &C. v. COMMONWEALTH & W. H. MULLICAN.**New Trial—Newly Discovered Evidence—Principal and Surety.**

After trial and judgment against sureties, they discovered that they could prove by witnesses that their principal, before his death, and before the action sued on, had made payments which would considerably reduce the amount of the debt. This evidence was brought to light, by papers among the effects of the deceased, and was such that it could not have been discovered before the term at which the action was set for hearing. Held, sufficient to order a new trial in the court below.

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APPEAL FROM DAVIESS CIRCUIT COURT.

October 22, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Through the multifarious statements of the original and amended petitions the allegation of the following material facts is discoverable.

First. Since the trial of the action on the sheriff's bond, appellant, Griffith, had found among the papers of his intestate, a note executed by Mullican to him, for fifty dollars for borrowed money, bearing date subsequent to the return day of the execution in his favor against Queen, &c., and for the failure to return which, appellants as sureties of intestate were sued on his official bond, and judgment recovered against them.

Second. That since the rendition of said judgment, they had discovered that they could prove by Queen, that he was present and heard various conversations between Mullican and intestate on the subject of the amount due on said execution in one of which he recollected the parties agreed as to the amount then remaining unpaid, which was very small, but the precise sum he did not recollect, it was however so small, that they agreed intestate would have no difficulty to raise it, and they started off together, the one in search of the money to pay the sum agreed upon as being due, and the other to receive it.

Third. That on the 10th of September, 1864, Mullican drew on Harrison for two hundred dollars in favor of W. R. Kenney; of which sum Harrison paid to Kenney, one hundred and fifty dollars, and was entitled to a credit for the same with Mullican out of the amount he had collected on the execution in his favor against Queen, &c., but which credit Mullican had failed to allow, and by enforcing his judgment against appellants would collect said sum a second time.

These facts, if proved, would certainly have reduced the judgment, if they had not altogether defeated a recovery against appellants. The only question therefore to be considered, is whether they have by their own negligence in the preparation of their defense of the action against them, deprived themselves of the benefit of the evidence?

It is to be observed that they were mere sureties of a principal,

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who was dead before the action was instituted, parol evidence of payments, if such evidence existed, they could not be presumed to be aware of, or to know to whom to apply for information. They did not apply to Kenney, as is alleged in the petition, for information as to payments made to him, but he then had forgotten the payment on the draft by Harrison, until he found the draft since the trial and was thereby reminded of the fact. It appears then that even by the utmost diligence they would not have been able to have discovered the evidence in the short period between the service of the writ in the case, and the commencement of the term at which it was tried, being only ten days. And they are entitled to the greater indulgence because the business was not transacted by themselves, and they could get no information on the subject from the real actor, who was in his grave.

If the grounds for a new trial depended upon the discovery of the note of Mullican to Harrison, that of itself would not be sufficient. Griffith is the personal representative of Harrison, and no sufficient reason for failing to produce said note on the trial was presented. But that, with the discovery of the other evidence and the inability to produce it on the trial, would seem to authorize the relief sought. The demurrer to the petition was therefore improperly sustained.

Wherefore the judgment is reversed and the cause is remanded with directions to overrule the demurrer, and for further proceedings consistent herewith.

Sweeney & Stuart, for appellants.

Williams, Ray & Hardin, for appellees.

WM. L. WALLER v. W. JAY JOHNSON, & CO.

Depositions—Exceptions—Retaking.

Where a right to retake depositions is granted, the former having been suppressed on the ground of having been taken before the time allowed by law, exceptions sustained thereto, held to be a mere irregularity, which was cured by the retaking of the depositions.

Husband and Wife—Married Woman's Estate Not Liable for Necessities.

Under the statute (2 R. S., p. 8), to bind a married woman's estate for

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necessities, it is essential that the credit originally should be given to her, and not to her husband alone.

Pleading—Petition—Allegations to Affect Married Woman's Estate for Necessities.

In an action to subject a married woman's estate for necessities, it is necessary to allege in the petition that the credit was originally given to her, for herself or family.

Same.

An allegation that she signed a note with the object and intent to charge her estate with the payment of the debt, or "was borrowed for necessities, and used by the defendants," held insufficient to authorize the deduction that the wife borrowed the money for her own use, or for her family.

Same—Proof—Action on Joint Note of Husband and Wife.

In an action on the joint note of a husband and wife, it devolves on the party seeking to charge the wife's estate therewith, to repel the presumption that the debt is that of the husband alone, by a direct averment of the necessary statutory facts to bind the wife.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 29, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

It is alleged in the original petition of appellant that the "defendants," W. Jay Johnson and Anna B. Johnson, being indebted to him in the sum of \$1500, promised to pay the same by their certain promissory note, &c. It is also alleged therein that the defendants were non-residents and owned as tenants, in common with others, a tract of land in Jefferson county, and an attachment was prayed for against their property, which was obtained, and levied on the land of the defendant, Anna B. Johnson.

This petition was answered, and Mrs. Johnson set up, and relied on her coverture as her only ground of defense.

Appellant then amended his petition, and averred that the object and interest of Mrs. Johnson in signing the note sued on was to charge her estate with the payment of plaintiff's debt of \$1500. That the said \$1500 was borrowed for necessities and used by the defendants, W. Jay Johnson and Anna B. Johnson, on

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the faith that said Anna B. Johnson was the owner of said real estate.

The court below, on final hearing, dismissed the petition. And to revise and reverse that judgment, this appeal is prosecuted.

The first objection made in the brief of appellant's attorney, to the proceedings, is that Anna B. Johnson's exceptions to the depositions of J. M. Evans, G. M. Martin, W. T. Martin and A. F. Pence, were sustained, upon the ground that they had been taken before the law permitted them to be taken, and without notice, or rather that is the language of one of the exceptions, and the depositions seem to have been suppressed on the ground that they were taken before the party had by law the right to take them.

In reply to that objection it is proper to say that leave was granted appellant to retake the depositions, they were retaken, and if the court below erred in sustaining the exceptions to them, it was a mere irregularity in the progress of the cause, which was cured by retaking the depositions and from which no such injury resulted to appellant as would authorize a reversal. *Knox and McKee v. Atterberry*, 3 Dana, 580.

As to Mrs. Johnson, the judgment must be sustained on two grounds.

First. The statute subjects the real estate of a married woman to such debts contracted by her.

“After marriage on account of necessities for herself or any member of her family, her husband included, as shall be evidenced by writing signed by her and her husband.” 3 R. S., p. 8.

And this court in construing this statute in *McMahon v. Lewis*, 4 Bush, 138, held that whilst under our statute a married woman having estate, may bind herself for necessities it is essential that the credit originally should be given to her, and not to her husband alone, for if to him alone, she will not then be an original debtor, but a mere surety.

Now there is nothing in the amended petition from which it can be fairly inferred that this debt was originally contracted by Mrs. Johnson for necessities for herself, or family, or that the credit was originally given to her, the averment that she signed the note, with the object and intent to charge her estate with the payment of the debt, is not at all inconsistent with the assumption,

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or fact, that the debt was contracted by her husband, and was in fact his debt. Nor does the allegation that the money "was borrowed for necessities, and used by the defendants" authorize the deduction that the wife borrowed it, even if it were loaned on the faith that she was the owner of said real estate.

The legal presumption, in the absence of any direct allegation to the contrary, is that the husband, and not the wife, is the actor in such transactions, and it devolves on the party seeking to charge her estate to repel that presumption by a direct averment of all the facts necessary under the statute to charge her, or her estate. And may it not be truthfully said that the facts stated in the amended petition tend rather to fortify than repel this conclusion, at all events, they are insufficient to render her real estate liable for this debt.

Second. The evidence is not sufficient to render Mrs. Johnson, or her estate, liable for this debt, even if the pleadings were.

The fact is not controverted that the note sued on was given in lieu of one for the same amount, bearing the same date and given at the same place, viz: Memphis, Tenn., by Mrs. Johnson alone, and to secure which a mortgage was given on a wharf boat, by her trustee, John Thruston; the note given by Mrs. Johnson alone was represented to have been lost, and perhaps for a time was lost, and the one sued on given in its place at the request of appellant. It is evident therefore, that the first note was neither given for, nor accepted as evidence of a debt contracted by Mrs. Johnson for necessities for herself or family. It was not signed by her husband and herself, as required by the statute, and was secured by a mortgage, and could not have been a charge on her real estate.

Moreover, although some of the witnesses of appellant prove that he paid money on some orders drawn on him by Mrs. Johnson, and occasionally advanced money to her, not in large sums, yet none of them were present when the note sued on was given, and do not know whether the amounts advanced to Mrs. Johnson, and paid on her orders, were embraced in the note or not. And Martin who was more familiar with the business than either of the other witnesses, on cross examination says he does not know what was the consideration of the note. And appellant failed to show that the credit was originally given to Mrs. Johnson, when if the fact had been so, he could have done it.

Appellant neither by his pleading nor proof, showed himself

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entitled to any relief as against Mrs. Johnson, and the judgment dismissing the petition as to her, is to that extent, approved and affirmed, the dismissal of the petition operated as a discharge of the attachment.

But no reason is perceived why appellant should not have had judgment against Wm. J. Johnson. The original petition stated facts constituting a good cause of action against him, he appeared and filed his answer to that petition, but presented no defense to the action as to himself, and judgment should have been rendered against him.

Wherefore the judgment dismissing the petition as to Wm. Jay Johnson is reversed, and cause remanded with directions to render *judgment* against him for the amount of the note sued on and costs, and for further proceedings consistent herewith.

Stratton, for appellant.

Pope, for appellees.

L. F. AND J. SANDERS *v.* JOHN W. ROSS.

Adverse Possession—Instructions—Quieting Title—Ejectment.

In an action for possession of land, an instruction that if the jury believed from the evidence that the appellants and those under whom they claimed, had been in the continuous possession since 1819, of the land embraced in the deed to S., claiming to the boundary of said land, and that the land in controversy was included by said boundary the law was for appellant, held erroneous, in that the converse of the proposition would be that if the possession had not been continuous since 1819, the law was not for appellants, and was misleading.

Same.

The jury should have been instructed that fifteen years uninterrupted adverse possession of land gave a perfect right of entry and would prevail in ejectment against an outstanding elder patent.

APPEAL FROM OWEN CIRCUIT COURT.

October 11, 1870.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE LINDSAY:

The motion of appellants for judgment in their favor, notwithstanding the verdict of the jury against them, was properly overruled. The answer denied their ownership, or their right to the possession of the land in controversy, and presented a good defense to the action.

We also think the conflict of evidence warranted the court in refusing them a new trial on the ground that the verdict was against the testimony. Instruction No. 1 asked for by them fails to set out clearly the fact that their possession must have been not only actual and adverse, but *continuous*, for the period of fifteen years before their title would become perfect by reason of possession alone, and was therefore properly refused. But we think they were entitled to an instruction upon this proposition, and we do not agree that the law was correctly given the jury by instruction No. 1 given by the court upon its own motion.

By said instruction the jury were in effect told that if they believed from the evidence that appellants and those under whom they claimed had been in the continuous possession since 1819 of the land embraced in the deed to James Sanders, claiming to the boundary of said land, and that the land in controversy was included by said boundary, then the law was for the appellants. The objection to this instruction is that the converse of the proposition is that if the possession had not been continuous since 1819, the law was not for appellants, and in this we regard it as misleading. Before the adoption of the Revised Statutes, twenty years uninterrupted adverse possession of land gave a perfect right of entry, and would prevail in ejectment against an outstanding elder patent. 4 Dana, 483. Since their adoption, fifteen years gives the same right, and the jury should have been so instructed.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings consistent herewith.

Scott, for appellants.

Landram, Trabue, for appellee.

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E. T. WHITE v. G. W. GABBERT.

Bills and Notes—Off-set—Partnership Accounts.

Evidence examined and held sufficient to sustain a judgment for an assignee of a note given by one member of a partnership to another, though there were outstanding partnership accounts unsettled between the partners, prior in date to the note executed and assigned.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 17, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

Gabbert, assignee of Yewell, sued White, surviving partner of the firm of Blair & White, on a note for five hundred and eighty dollars. White answered, claiming that as surviving partner of the firms of Blair & White and Blair, Queen & Co., he held accounts older than the note against the assignor Yewell, and he plead the same as set-offs against the note. He made his answer a cross petition against Yewell. Gabbert replied to the answer, denying all knowledge or information as to the accounts, and Yewell answered the cross petition, claiming that he had paid them, before the execution of the note, by giving Blair & White credit on another note he held against them.

The only evidence in the case was proof of admissions made by Yewell to the effect that the accounts were just, but he at the same time claimed that they were paid in the manner charged in his answer.

There is no explanation given as to why Blair & White executed the note, whilst they held accounts against Yewell for a sum nearly as great, and which had been due for more than a year at the date of its execution. This circumstance raises a strong presumption that the accounts had been settled.

Considering all the circumstances in the case, we are of opinion that the judgment of the circuit court in favor of Gabbert, and

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dismissing the cross petition against Yewell, is correct, and the same is affirmed.

Weir, Harlan N. & B., for appellant.
Bush, for appellee.

GEORGE SINCLAIR v. COMMONWEALTH.

Criminal Law—Homicide—Instructions.

Under an indictment for voluntary manslaughter, an instruction: "And they ought to find him guilty of murder," is erroneous in that they are to assume that the commission of a homicide, if willful and without legal justification or excuse, is murder, although it may have been but manslaughter, if done without malice.

Same.

An instruction: "If they believe from the evidence that N. made S. a proposition to fight a fair fight, and that S. accepted said proposition with the intention to take Neal's life, when he should thus become engaged, and did immediately afterwards, in pursuance of said deadly purpose, kill N. without being under reasonable apprehension of great bodily danger, growing out of threats, or from any other cause, they ought to find S. guilty of murder," is erroneous, there being no sufficient evidence of an acceptance, by S. of N.'s proposition to fight.

Appeal and Error—Juror Excused—Criminal Procedure—Criminal Code, Section 340.

Interposition by the court, to excuse a juror, drawn on a panel, for his personal convenience, or for refusal to grant a new trial for alleged bias and misconduct of one of the jury, does not constitute grounds for reversal of a judgment of conviction under section 340, Criminal Code.

APPEAL FROM SCOTT CIRCUIT COURT.

October 4, 1870.

(OPINION OF THE COURT BY JUDGE HARDIN:

The appellant, George Sinclair, indicted for the murder of James Neall was convicted of voluntary manslaughter, and sentenced to five years confinement in the penitentiary, and to reverse that judgment he now prosecutes this appeal.

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The bill of exceptions questions the propriety of the action of the court in interposing to excuse a juror drawn on the panel, for his personal convenience, and also in refusing to grant a new trial for alleged bias and misconduct of one of the jury, but however sufficient these reasons should have been for vacating the judgment in the court below, they do not constitute any of the available grounds for reversing a judgment of conviction in this court. (Criminal Code, section 334.)

The instructions which were given to the jury, at the instance of the attorney for the Commonwealth, made, in their application to the facts, the principal questions to be determined by this court.

It appears from the evidence that the parties were together at a primary election where some disorder occurred between others, besides themselves, and an attempt was made to arrest a man named Fightmaster, who fled from the place, causing commotion and pursuit, and about the same time an altercation occurred between Neall and the prisoner, Neall accusing him of having caused the arrest of his father during the war, and slapping him in the face, and proposing to fight with him, and very shortly afterwards the prisoner rushed on Neall with a drawn knife and stabbed and killed him.

Upon these and other facts which the evidence conduced to prove the court instructed the jury in substance and effect:

1. "If the jury believe from the evidence that the defendant stabbed and killed Neall wilfully and without sufficient reason to believe that such killing was necessary to protect himself from great bodily harm, they ought to find him guilty of murder.

2. "If they believe from the evidence that at the time Sinclair struck the fatal blow, Neall had abandoned the assault, and manifested no intention to resume it, the previous provocation, if any, would not justify the killing, and they ought to find him guilty of murder.

3. "If they believe from the evidence that the defendant was urged by others to kill Neall, and would not have done so but for their counsel, he was no more excusable than if he had acted solely of his own free will, and if under such counsel he wilfully took Neall's life without provocation in the first instruction mentioned, they ought to find him guilty of murder.

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4. "If they believe from the evidence that Neall made Sinclair a proposition to fight a fair fight, and that Sinclair accepted said proposition with the intention to take Neall's life, when he should thus become engaged, and did immediately afterwards, in pursuance of said deadly purpose, kill Neall without being under apprehension of great bodily danger, growing out of threats, or from any other cause, they ought to find him guilty of murder."

Other instructions were given which not being deemed prejudicial to the defendant, need not be stated.

Considered with reference to the charge of murder, the first, second and third instructions are all liable to the objection that they assume that the commission of a homicide, if wilful and without legal justification or excuse, is murder, although it may have been but manslaughter if done without malice; and although those instructions relate to an aspect of the case

if the jury did not find against the defendant, they were nevertheless calculated to wrongfully impress the jury as to the legal import of the facts and magnitude of the offense, if any, which they conduced to establish.

As to the principal proposition embodied in the third instruction, to the effect that if the defendant acted wrongfully under the advice of others, the fact that he was so advised did not excuse him for killing Neall, we do not perceive that the court erred, although if by such counsel or advice he was deceived or misled as to any supposed danger to his life or person from Neall, the fact that he was so advised may have been competent evidence as conducing to mitigate his punishment, or to be considered with other facts and circumstances in determining the question of guilt; and the court, if asked, should have so instructed the jury.

The fourth and last instruction we have indicated, was, we think, misleading, there being no sufficient evidence of any acceptance, by the defendant of Neall's proposition to fight, to authorize such an instruction.

Wherefore the judgment is reversed, and the cause remanded for a new trial, with proceedings not inconsistent with this opinion.

Robinson, Breckinridge, for appellant.

Opinion of the Court.

JACOB LEMMON *v.* S. A. THEOBALD, ADMR. OF L. BENNETT.

Vendor and Purchaser—Lien in Deed—Non-Production of Notes.

Though a lien be reserved in a deed for unpaid purchase money, the non-production of notes, or showing as to their existence, for more than 20 years, held sufficient to authorize cancellation of lien.

APPEAL FROM GRANT CIRCUIT COURT.

January 22, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Although a reserved lien is provided in the deed of Lemmon to his son-in-law, the decedent, Bennett, for the deferred payments, which deed was executed in the year 1850, yet it does not show whether notes were or not executed therefor, but it is made to appear by appellant's witness, the surviving widow of the decedent and appellant's daughter that her husband had executed notes.

The non-production of these notes and the great lapse of time, together with the other evidence establishing that Lemmon said he had given the farm to his son-in-law, connected with the non-presentation of his claims and his direction to the administrator to appropriate the personal assets to the payment of the decedent's debts and if these were not sufficient he would pay the remainder, so as to save the land left by decedent to his family, are sufficient to sustain the correctness of the judgment disallowing appellant's claim, hence the judgment is affirmed.

Trimble, for appellant.

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GEO. W. UPTON v. JOB. D. REDMAN, &C.

Pleading—Petition—Insufficiency on Bond.

A petition, which does not set out, or state in terms or substance the covenants of an official bond, held insufficient to constitute a cause of action on the bond.

Same—Cause of Action Stated.

A petition alleges that two executions, which are sufficiently described, were collected by R., who refused, on demand, to pay over the money, and alleges a joint liability of both defendants for money had received. Held to be good on general demurrer to its sufficiency.

APPEAL FROM LARUE CIRCUIT COURT.

January 24, 1888.

OPINION OF THE COURT BY JUDGE HARDIN:

Testing the sufficiency of the petition in this case by the opinion of this court in the case of Hill for the use of Wintersmith against Barrett, &c., 14 B. Monroe 84, we incline to the opinion, that as it does not set out or state in terms or substance the covenants of the official bond of Redman, it fails to state facts sufficient to constitute a cause of action upon the bond. But we are nevertheless of the opinion that the petition states facts which constitute a cause of action. It alleges that the two executions which are sufficiently described against Duckworth and in favor of the plaintiff, were collected by Job D. Redman, who refuses on demand to pay over the money, and alleges a joint liability of both defendants for the money so received to the use of the plaintiff. The general cause of demurrer jointly assigned by the defendants, simply raised the question whether or not the petition disclosed a cause of action, and as we are of the opinion that it did, it results that the court erred in sustaining the demurrer and dismissing the action.

Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Read, for appellant.

Hays, for appellee.

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MARY CARTER v. L. D. NELSON.

Partition—Equitable Assignment—Joint Tenancy.

Either one of joint tenants, having a right to a sale or partition and division of property, a partition ordered by the court upon petition and proof, held proper, the appellant having protested against a sale.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

June 17, 1869.

OPINION OF THE COURT BY JUDGE WILLIAMS:

As the appellant owned three fourths of the tavern house and adjoining land, and appellee the other, he had a right upon his petition, for that purpose, to have a sale in gross, if the property was not susceptible of division, or if it was, a partition.

As appellant protested against a sale, and as the court ascertained through commissioners, that the property was susceptible of a division and two of the three commissioners agreed on a partition and reported it to court, which the court confirmed after hearing the evidence, and though six of the ten witnesses were of opinion that the partition was not equal according to interest, yet the others together with the commissioners thought it was, so, if all were equally credible in judgment and knowledge, we could not reverse on this state of facts, but it is apparent that Mrs. Carter got that part of the property which is the most productive and now valuable without considerable outlay, whilst the land assigned to Nelson is adjoining other premises of his and therefore the more beneficial to him and this is an equitable reason for so assigning it, unless it does the other joint owner injustice, which does not appear.

Wherefore the judgment is affirmed.

Hazelrigg, Winn & Summers, for appellant.

Apperson, for appellee.

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JNO. STOUT & OTHERS, EXECUTORS, v. VIRGINIA MOORE ET AL.

Wills—Legacy—Distribution.

Heirs and distributees have a right to demand distribution of an estate on the happenings of a contingency contemplated by the testator, and such payment would be a liquidation of the Executor's liability on account of assets.

Descent and Distribution—Legatees' Disability.

Executors, having the control of the funds necessary to educate a testator's children, are the sole judges of whether any of them, by habits of dissipation, would not be entitled to a distribution of assets.

APPEAL FROM WOODFORD CIRCUIT COURT.

June 8, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The testator Jno. Nut evidently contemplated that his estate should be distributed at his wife's death, or sooner, should his youngest child arrive at full age or marry, subject however to some specific directions as to the education of his children, the remaining interest of such as should become dissipated, consequently at the death of the testator's widow the legatees had a right to demand a general distribution, the adults to themselves and the minors to their guardians, and such payments would be legal liquidation of the executors liability on account of assets.

The executors, and not a commissioner or trustee of the court, was vested with the control of the funds necessary to educate the testator's children according to his directions in his will and so they were made the judges whether any of his children had acquired such habits of dissipation as to render unsafe in their hands the legacy given to them and if so dissipated they were to retain such legacy for life and pay over the profits to him or her, the time to judge of this matter by the executors must be limited to the time of general distribution for when once paid over the executors have no further control; the court therefore very properly referred all these matters to the judgment and discretion of the executors, hence the judgment is affirmed.

Porter & Greathouse, for appellant.

Opinion of the Court.

J. W. SMITH v. GRANVILLE SMITH, &C.

Mortgages—Foreclosure—Notice of Prior Conveyance—Record.

In the absence of record notice, a mortgagee of an undivided interest in lands is held to be entitled to a foreclosure, as against an unrecorded bond for title executed prior to the mortgage.

APPEAL FROM BREATHITT CIRCUIT COURT.

October 5, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

A. B. Patrick and the appellant, J. W. Smith, owned jointly a large tract of land lying on both sides of the North Fork of the Kentucky River, including coal lands on the South side of the river, and on the 26th of November, 1860, Patrick sold and conveyed to Smith and A. P. Williams jointly, his interest in the whole tract, describing it as an undivided moiety in all the land and coal lands on both sides of the river, and on the 11th of December, 1865, Williams made a deed of mortgage of his interest in the land so acquired to the appellee, Granville Smith, to secure a debt of about \$1500, and this suit was brought by Smith for a foreclosure of that mortgage.

The appellant filed an answer resisting the relief sought as to the land on the South side of the river, on the ground that in 1859, he and Patrick, then the joint owners, had divided the land between them, making the river the line, and he taking the land on the South side and Patrick that lying on the North side of the river, and he set forth a bond from Patrick covenanting to convey his title to the land on the South side of the river accordingly, and alleged that he had executed a bond also for a conveyance to Patrick of the land on the North side, except his interest in certain mills.

On the pleadings and exhibits only, no testimony being taken by either party, the court adjudged a foreclosure of the mortgage, and decided that Williams' interest, embraced and conveyed by the mortgage, was an undivided fourth part of all the land as described in the deed of Patrick, and the mortgage, and was not

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restricted to the North side of the river by the alleged agreement between the appellant and Patrick, made in 1859. And to reverse that judgment this appeal is prosecuted.

As the appellant, as well as Williams, derived and claimed title under the deed of Patrick, to one fourth of the land, described as an undivided interest in the whole tract, and it does not appear that the appellee when he accepted the mortgage from Williams, had notice of the alleged contract between the appellant and Patrick, nor even that Williams had such notice when he became a joint purchaser with the appellant, of the title and interest of Patrick, describing as extending throughout the whole of the land; the rights of the appellant under his contract with Patrick, however available they may have been against him, could not be successfully asserted as against the appellee, who must be presumed to have accepted the mortgage on the faith of Williams' recorded evidence of title, which the appellant as a co-grantor with Williams, was equitably estopped from controverting.

Wherefore the judgment is affirmed.

Lindseys, for appellant.

Craddock & Trabue, for appellees.

W. J. WALKER, & CO., H. C. SMITH, & CO.

Bills and Notes—Waiver of Defense.

The acceptance of an article for which a note is given, without objection, and long possession of same, is a waiver of a defense against the note for the consideration, except for illegality.

Same.

Where a new note is taken, in consideration of the surrender of another debt, the assignee is estopped from impeaching the legality of the original consideration.

Bills and Notes—Illegal Consideration—Adulteration in Violation of Statute.

A note, given for the purchase of an article, adulterated in violation of a penal statute, is voidable and without consideration, in the hands of the obligee or his assignee without the privity of the obligor, and for a new consideration on which the assignee accepted it.

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APPEAL FROM ESTILL CIRCUIT COURT.

February 12, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The acceptance of the whisky without objection and long possession and use of it without an offer to return it or rescind the contract, waived any defense against the note for the consideration except that of illegality and all cause of action on account of a breach of warranty by a deficit in quantity or quality.

But if, as alleged, the vendor of the whisky and obligee of the note had drugged it in violation of the penal statute against all such chemical adulteration, the consideration was illegal and the note therefore voidable in the hands of the obligee and also in the hands of an assignee without the privity of the obligor and for a new consideration on which the assignee took it.

In this case the testimony tends to prove that the appellants gave up a debt on Johnson in consideration of a new note and the assignment of it to them. If this be so the appellees are estopped, as against the appellants, from impeaching the legality of the original consideration.

Consequently, the court erred in the instruction to find for the appellees if the whisky was drugged and known to be so adulterated by the obligee when he sold it. The instruction ought to have been qualified by the hypothetical estoppel.

Wherefore, the judgment for the appellees is reversed and the cause remanded for a new trial.

Bennett, for appellants.

Burnam, Lilly, for appellees.

GEO. A. THOMAS & WIFE v. MARGARET NAYLOR'S ADMR.**Gifts—Acquisition by Donee.**

A deed of gift, duly recorded, held to be a binding contract of conveyance, in the absence of undue influence or improper constraint.

Wills—Undue Influence.

A contract of conveyance, held to be valid, where the donor was not

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improperly influenced, but acted from motive of kindness and attention from the donee, before death of donor.

APPEAL FROM ADAIR CIRCUIT COURT.

October 18, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

Although the death of Mrs. Margaret A. Naylor probably occurred much sooner than either she or the appellants contemplated when the contract of March 19th, 1868, was executed, and the contingent and uncertain consideration therein expressed was therefore of less pecuniary value than they expected, yet we do not perceive any sufficient grounds for setting this contract aside. Though in reduced and declining health, Mrs. Naylor appears to have possessed ample capacity to exercise the right of disposing of her property as she pleased; and there is not sufficient evidence of constraint or improper influence or fraud on the part of the appellants to induce her to dispose of it as she did. The proof is conclusive of her attachment for her step-daughter, Mrs. Thomas, whose kindness and attention to her seems to have been very commendable, and it is fair to presume that affection and gratitude to her, as well as a sense of justice, or purpose of remuneration, prompted the fixed purpose which she certainly entertained of bestowing her small estate, in some form, on the appellants. And although in consequence of some dissatisfaction of her step-son, Parker Naylor, she at one time assented to the suggestion of Mrs. Garrett to cancel the contract, and the appellant, George A. Thomas, seems to have gone in good faith to procure the deed for that purpose, when she was informed it had already been recorded, she expressed her satisfaction that it had, and elected to continue the contract in force, as with the assent of the appellant, she had a perfect right to do.

It seems to us, therefore, that the court erred in its judgment setting the deed aside, and for the recovery of the property against its provisions.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Winfrey, for appellant.

Baker, Garnett, for appellees.

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WINIHISTER & Co. v. JAMES W. DARNABY.

Attachment—Dismissal—Interlocutory Decree—Re-instatement.

The discharge of an attachment, *pendente lite*, is an interlocutory order, from which no appeal lies. It can only be re-instated by application to and before a Judge of the Appellate Court.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 9, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The discharge of the attachment *pendente lite* is only an interlocutory order, the remedy for which, if erroneous, was an application to an appellate judge for reinstatement as in case of an interlocutory dissolution of an injunction.

Wherefore, as this suit is still pending in the circuit court, the order discharging the attachment was not a final judgment revisable by this court. Consequently the appeal from that order is dismissed for want of jurisdiction.

Carr, for appellant.

Breckinridge, for appellee.

JAMES M. LITTELL, & Co. v. MELIAH J. REDD, & Co.**Deeds—Execution—Acceptance.**

Where a deed is duly and legally executed, the law presumes that the beneficiary therein will accept it.

APPEAL FROM GRANT CIRCUIT COURT.

May 26, 1871.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

We are assured by the allegations in the petition, and the admissions in the answer of the existence of the material facts that a deed was executed by appellant to his daughter the appellee M. J. Redd for 110 acres of land in Grant county, and that it was acknowledged by him before the proper officer. But perplexed by the great uncertainty in which other material facts are shrouded by the conflict in the evidence and we may add by the unsatisfactory manner in which the witnesses depose, we do not feel authorized to reverse the judgment.

Where a deed is executed the law raises a presumption that the party benefited by it will accept it, on this case the appellee Mrs. Redd was the beneficiary in the deed, and the evidence is not sufficient to overcome that legal presumption.

Wherefore the judgment is *affirmed*.

Drane, for appellant.

S. WATSON, TRUSTEE, &C. v. W. F. MORTON, &C.

Assignment for Benefit of Creditors.

Attachment lien prior to assignment, not perfected as provided by Statute.

APPEAL FROM GRAVES CIRCUIT COURT.

August 18, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The facts of this case can bring it within the principles decided by this court in the case of Johnson v. Parker, &c., 4 Bush, 149. The two cases are analogous, and after a review and re-consideration of the question involved, the court is entirely satisfied with the conclusion which was reached in the case *supra*, and that is decisive of this case.

The appellant, who was the trustee and holder of the legal

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title of his own motion, was a party to the suits, and the prayer in the petition for general relief was broad enough to authorize the relief sought.

Wherefore, the judgment is affirmed.

Bush, for appellants.

W. F. Morton, for appellees.

JAMES CALLAHAN, &CO. v. O. O. BRANNIN, &CO.

Courts—Judgment—Presumption of Correctness.

The action of a lower Court is presumed to be correct, until the contrary is made to appear, and everything necessary to sustain the judgment will be presumed which is not inconsistent with the facts stated in the record.

APPEAL FROM JEFFERSON CIRCUIT COURT. CHANCERY BRANCH.

May 13, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The judgment in this case recites that it was heard on the pleadings, exhibits, and proof by oral testimony, and the production, and exhibition of the original records and journals of the boards of the General Council of the City of Louisville. But no Bill of Exceptions was filed containing the evidence, and we are therefore unable to determine that the judgment of the court was not sustained by the evidence.

It is a well-settled legal principle that the action of the inferior court will be presumed to be correct until the contrary is made to appear, and everything necessary to sustain the judgment will be presumed which is not inconsistent with the facts stated in the record. *Vanable vs. McDonald*, 4 Dana, 336; *Harvey vs. Payne*, 2 Met. 451.

The evidence before the inferior court may have authorized the judgment, and yielding to the legal presumption in favor

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of the correctness of the court below we must affirm the judgment.

Mix, for appellant.

Thompson, Booth & Kline for appellee.

JAMES M. WATSON v. COMMONWEALTH.

Intoxicating Liquors—Indictment Sufficiency—License.

An indictment charged the keeping of a tippling house in Pendleton county. Defendant had a license to keep a tavern in the city of Falmouth. His house was just out of the city limits. Held, that there was no license to operate a tavern.

APPEAL FROM PENDLETON CIRCUIT COURT.

August 18, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

This indictment alleges that appellant kept a tippling house for more than three months in Pendleton county without having a license therefor.

Appellant attempted to justify under a tavern license granted to keep a tavern at Falmouth, and the proof indicated that the tavern was just outside the town boundary.

If the tavern was within the town, then the license was no protection, because no special authority therein was given to sell ardent spirits as was required by the act of January 23, 1867, applicable to Falmouth. If the tavern was without the town, then there was no license shown to keep a tavern. So the judgment was right in either event, and is therefore affirmed.

Duncan, Deadrick & Clark, for appellant.

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P. E. BROWN & Co. v. J. A. HUNGERFORD.

Sale—Personal Property—Possession Retained—Attachment.

A sale of lumber, and possession retained by the vendor, is not a valid sale so as to defeat the attachment of a subsequent creditor.

APPEAL FROM JEFFERSON CIRCUIT COURT. CHANCERY BRANCH.

August 18, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The evidence fails to show that the possession of the lumber accompanied the alleged sale, and the statements of Baldwin were made while he was in the possession of the property. His statement is he sold it in January 1868 and he proves possession was delivered to Blazer in Pittsburg months after the sale. The court below therefore did not err in refusing to sustain exceptions to them.

Furthermore when all the facts and circumstances attending the transaction are considered they repel the conclusion that an absolute sale and delivery was made of the lumber to appellants prior to the attachments. It is unusual unbusinesslike for a contract of the magnitude and importance of the one here alleged to have been made to transpire without a witness; and not to be evidenced by a writing. No member of appellant's firm ever saw the lumber, nor does it appear that a bill of it, had been furnished to them before, or at the time they claim to have purchased it, and how its value could be ascertained at the time of the asserted purchase when it was a wreck scattered on the shores of the Alleghany river for 150 miles, is unexplained. And although Baldwin who is the only witness offered to prove the sale, states that the price was paid and a receipt executed therefor, he fails to state the amount paid, nor do appellants produce any receipt therefor. It will not do to say that the price, or that the receipt was given after the lumber was gathered and measured, there is no evidence of any correspondence between the parties after those events, or that any payments were made,

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the clear implication from Baldwin's deposition is that the contract was made and the money paid at the same time January, 1868, but if the receipt of which he speaks had been produced the difficulty would have been removed, as it is shown by their own witness that they have it, and fail to produce it, that is a strong circumstance that it would disclose something they desired to withhold.

The lumber was brought to Pittsburg by Baldwin and was removed to evade the attachment sued out by the hands employed to gather and raft it, for their wages, and when appellee's attachment was levied upon it below Louisville, Blazer, and not appellants claimed it, as had been arranged by Baldwin and Blazer at Economy after the hands had sued out their attachments at Pittsburg.

The evidence greatly preponderates in favor of the judgment, and let it therefore be *affirmed*.

Bullock & Anderson, for appellant.

Gibson, for appellees.

ZACHARIAH ELKIN & WIFE v. F. B. QUINSBERRY.

Husband and Wife—Husband's Assignment—Wife's Agent—Separate Property.

After the assignment, those living in the immediate vicinity, who had an opportunity of being informed on the subject, saw no change in the manner of conducting the business, and the corn raised on the farm was sold by Elkins as his own property; it was not claimed by the wife, nor did he aver his agency when he sold it.

Held, that the corn sold by Z. Elkins was his own property.

APPEAL FROM CLARKE CIRCUIT COURT.

April 17, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The evidence is not sufficient to authorize the conclusion that the cattle sold to Hodgkin were the property of Mrs. Elkin;

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her husband contracted for the purchase of them, and it is not shown that they were paid for with her money.

Z. Elkin when he made his assignment in May, 1862, was the renter of his mother's farm, and had been for several years. After the assignment those living in the immediate vicinity and had opportunities of being informed on the subject saw no change in the manner of conducting the business, and the corn sold to Bush and Robinson raised on that farm was sold by Z. Elkin as his own property; it was neither claimed by the wife, nor did he aver his agency when he sold it; and even if the farm had been rented by the wife, and the surplus products raised on it would have been her separate estate, the evidence does not in this case show an actual and visible change in the relation of the tenancy, but conduces to the conclusion that Z. Elkin was the real renter, as he had been before the assignment. As, therefore, one of the notes of Mrs. Elkin for the land purchased by her was credited by a part of the price of the cattle and the corn, which must be regarded as the property of her husband, and the two sums were sufficient to pay appellee's debt, we see no error in the judgment, and the same must be affirmed.

Simpson, for appellants.

Equiton, for appellee.

R. H. FIELD v. MARY PORTER.

Bills and Notes—Husband and Wife's Note—Surety for Husband and Wife—Separate Estate.

Although appellee is one of the payers of the note, it does not appear that her separate estate was bound for the payment of the same, and as she was a feme covert at the time of its execution it imposed no personal liability upon her. Fields by signing the note became the surety of the husband and not the wife.

Same—Lien on Married Woman's Estate—How Created.

The attempt to retain a lien in the conveyance to secure him on account of this note was an effort to create a charge upon the estate of a married woman, and appellee cannot be compelled, on account of her acceptance of the deed, to pay the note.

APPEAL FROM BULLITT CIRCUIT COURT.

Opinion of the Court.

April 25, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The conveyance from Porter and wife to Fields, bearing date October 14th, 1865, having been properly executed and acknowledged, not only constituted the latter the trustee for Mrs. Porter but authorized him to retain out of the trust funds the various amounts therein set apart for his benefit. The debt to Dawson was created subsequent to the execution of this deed of trust, and although Mrs. Porter is one of the payors of said note, it does not appear that her estate was bound for the payment of the same, and as she was a *feme covert* at the time of its execution, of course it imposed no personal liability upon her. Fields by signing said note became the surety of the husband and not of the wife. Hence he had no right to retain a lien upon the land conveyed to Mrs. Porter in satisfaction of what he owed her as trustee, to secure himself on account of his suretyship for her husband. His title bond, dated ovember 27th, 1865, as well as his conveyance of March 22nd, 1867, show that the consideration for the Long Lick land was the nine hundred and fifty dollars of notes due from Hoagland to Mrs. Porter, and that the payment of the Dawson note by Fields constituted no part whatever of said consideration.

The attempt to retain a lien in the conveyance to secure him on account of this note was an attempt to create a charge upon the estate of a married woman, and as it was not done in conformity with the statutes regulating the manner in which such estates may be charged, Mrs. Porter could not be compelled on account of her acceptance of said conveyance to pay said note. We are of opinion the petition of appellant was properly dismissed.

Judgment affirmed.

R. H. Field, for appellant.

A. H. Field, for appellee.

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JOSEPH WILLIAMS *v.* MARY J. JONES, &C.**Cancellation of Instruments—Inadequate Consideration—Weak Mental Condition.**

Evidence showed a sale of 26 acres of land, worth \$20.00 per acre, subject only to the widow's dower, and sale of a life estate of considerable value, in consideration of a horse, diseased, and which shortly died. Held, that in view of the grossly inadequate consideration, the grantor's advanced age, distressed and weak mental condition, and being overreached by the grantee, the transaction cannot be upheld by a Court of Equity.

APPEAL FROM EDMONDSON CIRCUIT COURT.

April 17 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

It appears from the evidence that the tract of about twenty-six acres of land to which the appellant had the legal title as heir of his son, Berry Williams, subject only to the widow's dower, was worth at least \$20 an acre, and that the life estate embraced by his deed to Mrs. Jones, was also of considerable value; all of which the deed purports to convey, in consideration of a diseased mare which died shortly afterwards of but little value at the time the deed was made, and belonging equally to the plaintiff and Mrs. Jones as distributees of the estate of Berry Williams deceased. In view of this grossly inadequate consideration for the conveyance, and the advanced age, distress and weak, if not deranged mental condition of appellant and the expectation he seems to have had at the time, of being further compensated by having a home with his daughter-in-law, which was disappointed; and Mrs. Jones' own admissions disclosing a knowledge of his incapacity, and a deliberate purpose to overreach him, we are constrained to conclude that the transaction was one which ought not to be upheld by a court of equity, and that the circuit court erred in refusing the relief sought by the plaintiff and dismissing his petition.

Wherefore the judgment is reversed and the cause remanded

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with instructions to render a judgment for the plaintiff in conformity with this opinion.

B. Lawless, for appellant.

CHARLES SEAL v. JAMES A. RAGLAND, &C.

Pleadings—Exhibits—Former Judgment—Failure To Impeach Genuineness—Burden of proof.

The answer fails to impeach the genuineness of the judgment exhibited with the amended petition, which declares the deed to appellant void and vacates and sets it aside. The facts thus appearing by the exhibit being uncontroverted, the burden was not on the plaintiff to produce other evidence of the facts the judgment purports to prove.

APPEAL FROM BATH CIRCUIT COURT.

April 8, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The facts alleged in the petition and amended petition were sufficient to entitle the plaintiffs to the judgment which was rendered, unless the answer of Charles Seal presented a valid defense and was such as to devolve on the plaintiffs the burden of proof. And in our opinion, the answer was not sufficient for that purpose. It is true, releasing his own claim on the deed of Ewing, and others which constituted his only ground for interposing to litigate the plaintiff's claim, or the remedy sought, he denied that the attached lot belonged to John Seal, or was in his possession, or that the deed to himself was fraudulent and was or had been set aside; but he failed to controvert the fact that the judgment of February 6, 1869, exhibited with the amended petition, was rendered, as it purports to have been in the suits of Wells and Nesbitt against Seal, &c. and which expressly declares the deed to the appellant void and vacates and sets it aside. The fact thus appearing by the exhibits being virtually uncontroverted and the answer failing to allege any facts in avoidance of the judgment, or to impeach its genuineness or validity, it was not sufficient to impose on the plaintiffs the burden of producing other evidence of the facts the judgment exhibited purports to prove, nor to constitute a bar to the action.

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Wherefore the judgment is affirmed.

Nesbitt & Gudgell for appellant.

Stone, Lacy, for appellee.

G. H. B. THOMPSON v. SAMUEL L. COOPER ET AL.

Guardian and Ward—Purchase of Land for Ward—Title in Trust.

A guardian is not bound to advance his own means to protect the land of his infant wards, but as he did purchase it for their benefit, he held the legal title in trust for them.

Same—Limitation.

The appellees did not lose their right to maintain this action by reason of their failure to sue immediately after arriving at age.

Same—Notice of Holding.

It is the duty of a Guardian to notify his ward of the manner in which he holds his land, and if he fails, within a reasonable time to offer to refund the money advanced by his guardian, he will lose his right.

Same—Jurisdiction.

This is in effect, an action to enforce the performance of a personal duty, and not to secure the possession of land, and is therefore not local.

APPEAL FROM BRACKEN CIRCUIT COURT.

April 21, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

Although appellant was not bound legally to advance his own means in the protection of the lands of his infant wards, yet it appears from the evidence in this case, that he did purchase the fifty acres of land for their benefit, and that by stating that such was his intention at the time he bid for the same, he thereby prevented other parties from bidding. The court did not err in adjudging that he held the title in trust for the appellees, nor do we think that appellees have lost their right to maintain

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this action, by reason of their failure to sue immediately after arriving at age. In all cases the law requires the utmost good faith upon the part of the guardian in transactions with his wards relative to their estate. It was his duty to have notified the appellees of the manner in which he held their land, and if he had done this, and they had not, within a reasonable time, offered to refund to him the money advanced for their benefit, the case would have been different. But he seems to have claimed the land as his own and denied their title and to have occupied and enjoyed the same until the rents and profits will go very far towards discharging his claim against them, and now seeks to avoid responsibility on account of this violation of his duty as a fiduciary. The question of jurisdiction is not raised in the pleadings, but if it had been, we do not regard it as available. This is in effect an action to enforce the performance of a personal duty, and not to recover the possession of land and is therefore not local in its character.

Judgment affirmed.

Willis & Taylor, for appellant.
Doniphan, for appellees.

THOMAS O. LETCHER v. S. R. TOLLE, ADMR., &C.

Judicial Sales—Consideration—Sale Bonds—Cost of Defending and Prosecuting Suit by Purchaser.

The costs and expenses of defending and prosecuting suits after the appellant purchased the land had no connection with the consideration of the sale bonds.

APPEAL FROM BARREN CIRCUIT COURT.

April 12, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The costs and expenses of defending and prosecuting suits, after the appellant purchased the land, had no connection with the consideration of the sale bonds, and as the appellee was not

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a grantor or warrantor in the deed of Thomas H. Letcher's heirs, by commission to the appellant, Thomas O. Letcher, it is not perceived how these claims could constitute any ground for enjoining the balance of the purchase money. Nor can we decide from the record before us, that the petition discloses any available ground for crediting or abating the unpaid sale bond for the alleged failure of consideration, in consequence of the adverse claim and possession of Scott and others. The suit of Myer's Admr. vs. Letcher's heirs, referred to as part of the petition, to show what were the terms and particular character of the sale, and from which claim the court could determine whether or not a sufficient defense is presented for a partial failure of consideration, is not copied in the record. If it was it might show the sale to have been one in gross only of so much land as belonged to Letcher's heirs, and not intended to embrace the lands of others in their adverse possession, and that the circuit court properly dissolved the injunction and dismissed the action; which we must presume it did, is the absence of a transcript of the suit, which constituted so important a part of the petition.

James, for appellant.

Leslie for appellee.

R. B. HOSKINS, ET AL. v. A. J. MURPHY.**Claimants' Bond—Sufficiency—Judgment On.**

A claimant's bond, providing that the parties will perform the judgment of the court, or have the property bonded, forthcoming to satisfy same, does not authorize the assessment against same of the 10 per centum damages in case the claim be unfounded.

Courts—Rule Against Sureties in Bond—Appeal.

A rule to show cause why sureties should not return property bonded by them, was responded to by sureties that a supersedeas had been executed: the rule was made absolute. Held, that as no judgment had been rendered against the sureties, the order making the rule absolute is not subject to adjudication on appeal.

Evidence—Abatement—Another Suit Pending.

Evidence, in the form of a record of another suit pending in a different

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State, between the litigants, cannot be offered, where no allegations of same are set out in the pleadings.

APPEAL FROM JEFFERSON CIRCUIT. CHANCERY DIVISION.

January 27, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellees attached 21 bales of cotton at Louisville, Kentucky, as the property of Lemoin, claiming that Lemoin and Ashley were their debtors, on the ground of non-residence, the debtors being residents of Mississippi. Hoskins the brother-in-law of Lemoin, presented his petition as claimant of the property, to which appellees replied denying his title and alleging that his purchase was fraudulent.

Lemoin and Ashley were only constructively before the court, having made no personal appearance. Hoskins gave bond and got possession of the cotton.

The court on final hearing adjudged against his claim and subjected the property to appellees' claim and ordered a rule against Hoskins' securities to show cause why they should not return the cotton, to which they respond that Hoskins had executed a supersedeas bond preparatory to taking an appeal to this court. The court below made the rule absolute, and both adjudications are here for corrections of errors. The evidence fully justified the court in pronouncing Hoskins' pretended purchase of the cotton as colorable and fraudulent, to shield it from Lemoin's creditors, hence it must be affirmed.

The covenants of the claimant's bond, which seems to have been taken in open court, are to abide and perform the judgment or have the value of the cotton forthcoming to satisfy it. The bond is somewhat informal and does not provide for the payment of ten per cent. damages in case the claim is unfounded, as is provided by the Civil Code, when a sale at law is suspended by the claimant. The evidence in the main case was agreed to be the evidence in this case, and it shows there were over ten thousand pounds of the cotton, worth at least 24½ cents per pound, which would make it worth \$2,450, or more, at least a sufficiency to pay this debt with all its costs.

But as no judgment has been rendered against Hall and

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Long on the claimant's bond for any given number of dollars, and as the court must yet ascertain the exact amount of their liability by future proceedings, we cannot adjudicate upon the mere order making the rule absolute.

If in the future order of the court, Hall and Long should be adjudged liable for a greater amount than their covenant justifies, they can then have it corrected by appeal, but in its present situation we cannot adjudicate upon this matter.

Hoskins offered in evidence a record of a suit and attachment in the state of Mississippi, by appellee against Lemoin and Ashley, wherein they insist that this same cotton was attached and bonded. As no such suit was set up in any pleadings and could not have abated the suit if it had been, we see no legitimate purpose for which the record of a mere pending and undetermined suit in another state could be used, and its rejection was proper.

Wherefore the judgment on Hoskins' appeal is affirmed, but Hall and Long's appeal is dismissed without any prejudice to future proceedings, either in the court below or in this court.

Russell, for appellants.

Barr & Goodloe, for appellees.

A. C. KINNISON v. S. D. BROOK'S ADMR.

Principal and Surety—Contribution on Guardian's Bond.

A ward obtained judgment against sureties, who were solvent, and severally as well as jointly liable upon a bond that was a nullity: Held, that without objection below, they cannot complain of the error in the bond.

Same—Judgment a Bar—Parties.

In a suit by a surety who paid the liability, for contribution, the judgment is no bar, because it was not rendered between the sureties.

Bonds—Guardian and Ward—Order Releasing Surety.

An order of the County Court, releasing the surety in a Guardian's Bond, from past and future responsibility, without taking another bond is void.

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Same—Blank Signatures.

The taking of signatures upon blank forms or papers, purporting to be bonds, is held to be no official bond.

APPEAL FROM BULLITT CIRCUIT COURT.

January 21, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

As heretofore adjudged by this court in the case of Brooks vs. Morrow, manuscript opinion, the order of the County Court releasing the security in the first guardian's bond from past and future responsibility without taking another bond was a nullity and the taking signatures upon a blank forms or pages was therein decided to be no bond. (See Brooks vs. Morrow, Ky. Opin., vol. 2, p. 202.)

And as the ward had obtained judgment in that suit against sureties that were good and solvent and were severally as well as jointly liable to them they did not see proper to complain of the error and those securities being so severally liable could not complain, therefore, they could not reverse said judgment though this palpable error was committed.

But in this suit by the security or his administrator who paid the liability for contribution, said judgment is no bar because it was not rendered between these parties, hence, the judgment against appellant for a due contribution was both just and legal.

The litigation between Kinnison and the securities of R. F. Samuels, the County Court Clerk who transacted said business so imperfectly, and who are parties to Kinnison's answer and cross petition has not yet been decided, their demurrer to his cross petition seems to have been overruled but were it not as his cross pleadings are still pending we could not correct any error which is not a final order.

As Kinnison's right to recover as against the County Judge and the Clerk upon his official bond can only be predicated upon his final responsibility to the wards it was right not to adjudicate the cross petition until this responsibility was ascertained.

Wherefore, the judgment on the petition of Brooks' administrators herein is affirmed. It is considered by this court that recovery of a *pro rata* part of the cost by appellee against appel-

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lant was equitable and right because he wrongfully escaped from the just litigation.

R. H. Field, for appellant.

A. H. Field, for appellee.

ELLEN BARKER vs. RICHARD HUNDLEY, ET AL.

Wills—Determinable Life Estate.

A will provided that B. should have an estate for life in the lands devised, determinable at the pleasure of B., and that N. was to have a home with B., on the land thus devised, as long as B. retained possession, and further directs that if B. should wish at any time to give up the premises, said lands should be sold, and the proceeds divided among the beneficiaries named. Held, to constitute a determinable estate by the voluntary surrender of same by B., but annexed no forfeiture by a refusal on her part to permit N. to reside with her.

Same.

Upon application by N. for a residence with B. and a refusal by B. to permit such residence, an action by N. could be maintained.

Same—Pleading.

To sustain a petition therein it must allege a demand by the plaintiff to enter upon the premises and a refusal by the defendant to permit same.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 8 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Under the will of Catharine Barker appellant took an estate for life in the house and premises constituting the residence of testatrix at the publication of her will, determinable at the pleasure of appellant, and while she provided that her brother J. Naylor, his two daughters, and Hundley, were to have homes with the devisee of the estate for life as long as she retained possession of the premises, if they desired it, there is nothing in the language of the will indicating an intention on the part

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of testatrix that the enjoyment of the estate devised to appellant should depend upon her consenting to permit the persons named to make their homes with her, and the propriety of that construction is repelled by the sentence immediately following in the will, which directs that if Ellen Barker should wish at any time to give up the premises, that they shall be sold, and the proceeds divided among the beneficiaries named, clearly making the estate determinable by a voluntary surrender of it by appellant, but annexed no forfeiture to the devise by a refusal on her part to permit Naylor and others to reside with her.

If these beneficiaries had desired a residence with appellant and had notified her of that desire, and she had refused to permit them a co-habitation there, they would have had a good cause of action against her for such refusal; but before an action could have been maintained against her, a demand to enter, and a refusal on her part, must have been alleged.

Furthermore, as to Hundley the evidence shows that he was instrumental in procuring the property to be rented and acted as agent for appellant in making the lease to Stepp; he is by his own acts therefore equitably estopped from asserting any claim to a forfeiture of the estate.

Wherefore, the judgment is reversed, and the cause is remanded, with directions to dismiss the petition so far as it seeks a forfeiture of the estate of appellant in the house and grounds attached, and for further proceedings consistent herewith.

Affirmed on cross appeal.

Huston, for appellant.

Johnston & Johnston, W. C. P. Breckinridge, for appellees.

J. A. GRAHAM AS ADMR. v. MARGARET W. HODGES, &C.

Partnership—Settlement—Laches.

Where a partner failed to demand a settlement of a partnership for six years after it had been closed, though could have done so any day, and failure to exhibit the books upon warning by the Court, is guilty of gross laches, and his action will be dismissed.

APPEAL FROM FRANKLIN CIRCUIT COURT.

Opinion of the Court.

October 6, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The partnership closed in 1861, the parties lived in the immediate neighborhood of each other, until the death of Sullivan in January, 1867; their opportunities for settling and closing up the firm accounts might be said to be daily for nearly six years, and with this suit no books are exhibited; the surviving partner fails not only, when warned by the court below of the consequences, to exhibit any account of the transactions of his late firm by the books, or a statement of the business, but fails to show that it was not in his power to produce the books, or the proper statement of the transaction and business of his firm.

Under such circumstances, this court cannot say that the court below after waiting at least a reasonable time on appellant, erred in dismissing his petition.

Wherefore, the judgment is affirmed.

James, for appellant.

Drane, for appellees.

JAMES DE BARD, ET AL. v. N. DAWSON'S ADMR.**Descent and Distribution—Heirs—Actions Against Administrator.**

Under provisions of sec. 10, ch. 40, Rev. St., an action cannot be maintained against the heirs of a decedent, upon a decree rendered against the administrator alone, but must be based upon the original liability of the decedent.

Pleading—Demurrer—Amended Petition—Insufficiency.

A defect in a petition, on a judgment against an administrator, that does not set up the original liability of the decedent, is not waived by a failure to demur to same. The petition not stating these facts is a valid ground of reversal, whether objected to in the Court below or not.

Same—Sufficiency of Amended Petition—Descent and Distribution—Action.

A petition on a judgment against an administrator, in an equitable action against the heirs, set out the fact that an execution had been issued upon the judgment against the administrator, and had been returned nulla bona, and that said judgment remained wholly unpaid,

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but made no reference to the nature of the original liability of the intestate. Held, insufficient to constitute a cause of action.

Same—Right of Contest.

The heirs of the decedent, not being concluded by the judgment against the administrator nor bound thereby, have the right to controvert the justice of the claim against their ancestor, and to enable them to do this, the same must be made the foundation of the action.

APPEAL FROM CARTER CIRCUIT COURT.

October 4, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

Duncan, the administrator of Dawson, having recovered a judgment at law against the administrator of George N. Davis, deceased, and being unable to collect the same by his common law execution, instituted a suit in equity against the heirs at law of Davis making his judgment against the personal representative the foundation of the action against the heirs, this proceeding progressed to a judgment against all the adult heirs, and they prosecuted an appeal therefrom to this court. And in January, 1858, said judgment was reversed, upon the ground that under the provisions of the 10th section of chapter 40 of the Revised Statutes, an action could not be maintained against the heirs upon the decree rendered against the administrator alone, but must be based upon the original liability of the decedent. The cause was remanded with leave to the plaintiff to amend, and on the 9th day of April, 1858, he did file an amended petition, setting up the fact that an execution had been issued upon his judgment against the administrator and been returned *nulla bona*, and that said judgment remained wholly unpaid, but made no reference whatever to the nature of the original liability of the intestate. The case lingered on the docket until April, 1868, without further pleading or evidence, when a second judgment was rendered against the heirs of Davis, and from that judgment they have appealed.

If the conclusions of this court as set out in their opinion in this case rendered in 1858, are correct, it is difficult to tell how the present judgment is to be sustained.

It is insisted by appellee that the proper move for the appel-

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lants to have taken advantage of the defect of the petition as amended, was by demurrer, and having failed to do so, such defect must be regarded as waived, but as the action could not be maintained upon the judgment against the administrator, and as the original liability was not set up, or even referred to, the petition as *amended* did not state facts constituting a cause of action, and this is a valid ground of reversal whether objected to in the court below or not. *Walters v. Chinn, 1st Metcalfe, 503.*

It is also claimed that the original petition does refer to the suit and judgment against the administrator, and that said suit with all the exhibits including the obligation of the decedent is on file in this action. But the sufficiency of the original petition was passed upon by this court when the first judgment was reversed, and the then rendered decree cannot be disturbed.

The heirs of Davis not being concluded or in any manner bound by the judgment against the administrator, have the right to controvert the justice of the claim against their ancestor, and to enable them to do this in the manner prescribed by law, the same must be made the foundation of the action, and until this is done no judgment can be rendered against them.

For the reasons herein set out the judgment is reversed, and the cause remanded with direction for further proceedings not inconsistent with the principles embodied in this opinion.

ANDERSON DAVIS, ET AL. v. JAMES A. BOYD.**Infante—New Promise—Estoppel.**

A new promise by an infant, to pay a note, in the absence of false statements relative to the note, or the age of the promissor, does not constitute an estoppel by anything said or done, from making a defense on the ground of infancy.

Same—Statute of Frauds.

A promise, after becoming of age, not in writing, to pay off the note, is not enforceable under the Statute of Frauds.

Same—Sale of Property—Pleadings.

Where an infant sells property, for which he had given his note, and in an action to enforce the note, he pleads infancy, and the pleadings fail to show that the property or its proceeds were in the possession of

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the obligor, after he attained lawful age, he was not bound to make restoration before relying on the plea of infancy.

APPEAL FROM DAVIESS CIRCUIT COURT.

October 19, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

Appellant having admitted on the trial that Boyd was an infant at the time he executed the note to Davis, it only remains to be determined whether the petition as amended, authorized a recovery. Although it does not clearly appear that Boyd was still an infant at the time he assured the Bells that the note was all right and that he would pay it. The language used will not readily admit of a different interpretation. Being an infant and it not appearing that he made any false statements relative to the note or his age, he was not estopped by any thing he did or said from making defense to this action. His promise to pay the note, made since he attained his majority, do not seem to have been made in writing, and therefore under our statute of frauds are not enforceable. It also appears that he disposed of the property for which the note was given. And as there is nothing in the pleadings to indicate that the same or its proceeds were in his possession after he attained the age of twenty-one, he was not bound to make restoration before relying upon the plea of infancy.

The court did not err in dismissing appellant's petition, and the judgment is affirmed.

Sweeney & Stuart, for appellants.

JAMES M. JOHNSON v. J. W. NUNN.**Fraudulent Conveyances—Advanced by Third Party—Preferred Lien.**

A advanced to B money to redeem lands sold under execution, with right of redemption, and took a deed from B to A, in consideration therefor. In a subsequent execution by creditors to subject the land to other liens; held, that B's conveyance to A is a mortgage creating a prior lien on the land.

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Same—Personalty Mortgaged.

When personal property was included in the deed of conveyance, A would be required to exhaust same, before subjecting his preferred lien on the real property.

APPEAL FROM METCALFE CIRCUIT COURT.

October 22, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

By virtue of an execution in favor of Winchester Nunn, the sheriff of Metcalfe county levied upon and sold the life interest of Joseph W. Pace in a small tract of land. The same having been sold for less than two-thirds of its appraised value, the right of redemption was levied on and sold to satisfy an execution in favor of Willis Whitlow. Both sales in the aggregate amounted to less than two-thirds of the appraised value of Pace's interest in the land. On the 24th of August, 1868, James W. Johnson advanced to Pace \$279.40, the amount necessary to redeem said land from the execution purchasers, and on the same day and immediately after the same was redeemed, Nunn sued out his execution against Pace (which had been but partially satisfied by the sale of the land) and placed it in the sheriff's hands at 3 o'clock p. m. In consideration of the amount advanced by Johnson, Pace had conveyed the land to him, about one hour before Nunn's execution was placed in the sheriff's hands, but the conveyance does not seem to have been acknowledged until a short time thereafter. The sheriff having levied on Pace's interest in the land, Johnson brought this suit to enjoin the sale. Upon the trial the court below dissolved his injunction and dismissed his petition, as we presume upon the ground that the conveyance to him from Pace was fraudulent.

We do not so regard it. It seemed to have been openly and publicly executed, and Nunn, the creditor, was present and called upon to witness it.

The mortgage upon the personal property, executed at the same time, together with other circumstances in the case, incline us to the opinion however, that the conveyance of the land was intended only as a mortgage to secure the repayment to Johnson of the money advanced to him, and it should be so treated by the

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court. The effect of the judgment appealed from is to deprive Johnson of any benefit whatever from his conveyance or to make a suit with the purchaser under Nunn's new levy inevitable, and the court having jurisdiction of the whole matter in this proceeding should have settled the rights of the parties.

Pace's interest should be subjected to the payment of Nunn's debt, but out of the proceeds of the same. Johnson's claim should first be satisfied, he being required to first exhaust the personal property embraced in the mortgage to him.

The judgment is reversed and the cause remanded for further proceedings consistent herewith.

James, for appellant.

Garnett, for appellee.

WILLIAM CURRANT v. ED CURRANT.**Garnishment—No Resistance—Costs.**

A garnishee who makes no resistance is not liable for costs. A judgment for costs being against the fund in his hands, the costs are to be first deducted therefrom.

APPEAL FROM BOURBON CIRCUIT COURT.

December 12, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The default admitted that the appellant owes more than the amount claimed by the appellee in this case, and the joint judgment cannot operate prejudicially to the appellant. Nor, though it would have been more prudent and regular to have directed a credit in favor of the appellant as garnishee, yet as the record will always secure him that credit the omission to direct it specially as the decree cannot do him any harm.

The appellant having made no resistance was not liable personally for costs, and apparently therefore the judgment against him for costs might be erroneous, but so small a matter ought not to reverse the entire judgment as the judgment for costs is,

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in effect, against the fund in his hands and will entitle him to a credit for the costs as well as for the principal amount adjudged against him. There is no error therefore certainly prejudicial to appellant. Wherefore the judgment is affirmed.

Hanson & Hanson, for appellant.

Alexander & Turney, for appellee.

W. R. COOK ET AL v. OSBORNE SANDERS ET AL.

Judicial Sale—Absence of Unfairness or Fraud.

A sale by a commissioner of land, substantially conformable to the law, in the absence of unfairness or fraud, and for a fair price, will not be set aside.

APPEAL FROM MADISON CIRCUIT COURT.

December 19, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The sale of the land, as reported by the commissioner, was substantially conformable with the law governing the duties of that officer; and though there is some contrariety of evidence as to the vendible value of the land, it does not appear that the price for which the land sold was grossly inadequate. Nor is there any evidence of unfairness or fraud in making the sale or in the purchase of the appellee.

It appears that at the instance of Renfro, the sale was suspended to give him an opportunity of making arrangements to advance the price which was bid by the appellee for the land, but he declined to bid himself or procure any one to do so, and allowed the appellee to become the purchaser at the bid which they had made. Upon the whole case, we think the motion to set aside the sale was properly overruled.

Wherefore, the judgment is affirmed.

Burnam & C., for appellant.

Turner, for appellee.

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JOHN T. DEJURNETT ET AL. v. JOHN SOPER ET AL.

Judicial Sales—Fraudulent Combinations to Prevent Bidding—Harmlessness.

Where evidence shows a fraudulent combination to prohibit competition in the bidding at a judicial sale of land, but that at the sale the land sold at its full value: held, to be a harmless error and not subject to rescission by the court.

APPEAL FROM BOURBON CIRCUIT COURT.

December 16, 1870.

OPINION OF THE COURT BY JUDRE LINDSAY:

The evidence in this case conduces to show that the appellee John J. Letton resorted to indelicate and perhaps improper means to prevent competition in the bidding in the last sale made of the lands of which his father died seized, and the circumstances proven are calculated to excite the suspicion that there existed a fraudulent combination between Talbot, Soper and said appellee to so manage the sale as to enable them to buy the land for less than its value. But we do not think the evidence in the case preponderates in favor of these conclusions to such an extent as would authorize the courts to interfere in behalf of the appellants, especially as the weight of evidence shows that notwithstanding any improper means that may have been resorted to, or any fraudulent combination which may have existed between the appellees, the lands sold for their fair market value. This being true, appellants sustained no damage by reason of the matters and things complained of, and their petition was properly dismissed.

Judgment affirmed.

Prall, for appellant.

Davis, Aleander & Turner, for appellee.

Opinion of the Court.

HENRY WENNER v. R. G. McDONALD & Co.

Work and Labor—Instructions—Right of Recovery.

An instruction, in an action for work performed, restricting the plaintiff's right to recover, to the question whether there was an express agreement to pay for all the work, and excluding the right of recovery on an implied liability to pay for extra work which the defendant permitted to be done without objection, and accepted, is erroneous.

Work and Labor—Acceptance of Work Done—Implied Agreement.

Where extra work has been done by a plaintiff, which was permitted by the defendant without objection, and accepted as done in accordance with his wishes, he will be held liable therefor, though not provided for in the contract between the parties.

APPEAL FROM CAMPBELL CIRCUIT COURT.

December 6, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

No error is perceived in the instructions or other rulings of the court in this case. The third instruction asked for the defendant was obviously misleading, in effect restricting the plaintiff's right to recover to the question whether there was an express agreement to pay for all the work, and thus excluding the right of recovery on an implied liability to pay for extra work which the defendant permitted to be done without objection and accepted as done in accordance with his wishes.

There is a contrariety of evidence on the question whether the plaintiffs did any more or other work than the original agreement bound them to do; but some of the testimony conduced to prove that extra work was done and an express agreement on the part of the defendant to pay for it, and to sustain the finding of the jury as to such work, and we can not say that the court should have granted a new trial on the ground that the verdict of the jury was not sustained by the evidence; especially as the jury had the benefit of their own inspection of the work and the house of

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Frith mentioned in the evidence as a model in some respects, by which the house was to be built.

Wherefore, the judgment is affirmed.

Hawkins, for appellant.

Fisks, for appellee.

WM. L. POYNTER v. M. DELPH.

Vendor and Purchaser—Courts—Correction of Error in Deeds.

After title to land sold, has been corrected by court proceedings, it is not error to require the vendor to convey the land, acknowledge the deed, and deposit same for record, instead of first producing it to the court for inspection.

APPEAL FROM MARION CIRCUIT COURT.

December 17, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The only objection to the title to the land as pointed out by this court was removed after the return of the cause to the court below, and as Delph's title is now unquestionable, and his conveyance will invest the appellant with a perfect title, we can not say that it is an error for which this court should reverse the judgment by requiring Delph to convey the land, and acknowledge the deed, and deposit it with the clerk of the county court for record, instead of first producing it to the court below for inspection, especially as the case is retained on the docket, and the circuit court has the power to remedy any defect in the deed required to be made.

As to the allowance of 30 days for appellee to pay the money and prevent a sale, he is not prejudiced by that indulgence, and can not complain of it.

Judgment *affirmed*.

James, for appellant.

Smith, for appellee.

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TURNER & MCCREARY v. MALINDA SEARCY.

Husband and Wife—Married Women Alienation of Separate Estate.

Under sec. 17, art. 4, ch. 47, Rev. Stat., a married woman cannot alienate her separate estate acquired by devise or conveyance, etc. Held, that as she cannot transfer such estate under those restrictions, she could not change its status by contracting debts.

APPEAL FROM MADISON CIRCUIT COURT.

October 3, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The second amended petition of appellees alleges that the estate of Mrs. Searcy sought to be subjected to the payment of their note is her separate estate. The answer admits that such is the fact. Section 17, article 4, chapter 47, Revised Statutes, provides, that a married woman shall not alienate her separate estate acquired either by devise or conveyance with or without the consent of any husband she may have, unless it be a gift and then only with the consent of the donor, or his personal representative. Mrs. Searcy seems to have acquired the estate in question by conveyance. As a married woman can not sell such estate, neither can she change it by contracting debts.. *Daniel v. Robinson*, 18 B. Monroe, 306.

Judgment affirmed.

Turner & McCreary, for appellant.

Burnam, for appellee.

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JAMES M. RICE v. JANE CLARK, &c.

KY. MUTUAL LIFE INS. CO. v. JANE CLARK.

Corporations—Stock Subscriptions—How Payable.

Articles of incorporation provided that stock subscribed for and closed up before the first election of directors and officers, could be paid for in any species of property, personal or real. Said payment to be ratified afterwards by the officers of the company. Held, that unless the provisions as to the requisite amount of stock to be subscribed was fully performed, no officers could be elected, and any transfer of real estate for stock would be subject to rescission by the vendor.

Same—Purchaser with Notice.

A purchaser of such property, from the company, with notice of the status of the vendor and the company, and the want of consideration, is estopped from setting up claim to the property, as against the original vendor.

Corporations—Stock Subscriptions—When Corporation Organized.

A corporation charter provided that when 2,000 shares of \$10.00 each were subscribed for, the stockholders were authorized to meet and elect a Board of Directors, and officers. Held, that no corporate acts could be performed until the requisite amount of stock had been, in good faith, provided for.

APPEAL FROM BOYD CIRCUIT COURT.

October 4, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

By an act of the Legislature of Kentucky, approved January 15, 1866, *Sess. Acts 1865-6, pp. 98-108*, the Kentucky Mutual Life Insurance Company was incorporated, with power to the corporators therein named to open books for the subscription of stock, the capital stock of which was not to exceed \$2,000,000, to be divided into shares of ten dollars each, and when two thousand shares were subscribed, the stockholders were authorized to meet, and elect, by ballot or otherwise, as they might agree, a president, and two or more directors for the management of the business affairs of the corporation.

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By section 6, it is provided that stock subscribed and closed up before the first election may be payable, and paid in any species of property, personal or real, as may be agreed upon by subscribers, and the corporator, or corporators, who receive the subscription, and subscribers shall receive from the corporators a certificate stating what per cent is paid on the subscription, and to what further assessment it is subject, or that it is paid up, and not liable to any further assessment, and these certificates shall be afterwards approved, and signed by the president and secretary, or actuary.

The business of this company as defined by section 8 of the act of incorporation is to make insurance upon the lives of individuals, to grant and sell endowments, and grant, sell and purchase, and dispose of annuities, and exercise all the powers held, and exercised by any other life insurance company.

Professing to have organized a company under said charter, Dr. Beck visited Catlettsburg in the spring and summer of 1866, representing himself as the president of the board of directors of said company, and as such claims to have effected an insurance on the life of appellee, Mrs. Jane Clark, at \$3,000; that the first contract of assurance was changed, and an assurance of her life made at \$3,000, all of which was paid by the conveyance of her life estate in a house and two lots in said town of Catlettsburg, valued by the parties at the price aforesaid—and a conveyance thereof made on the 12th of September, 1866, to the corporation, and on the 6th of November, 1866, the corporation conveyed said property to James M. Rice for the recited consideration of \$1,200.

On the 23d of July, 1867, this suit in equity was brought in the Boyd circuit court by Mrs. Clark, to set aside the original contract, and to annul the two conveyances, to be restored to her right to the real estate conveyed by her—for fraud on the part of the company, or its president, and want of consideration. The allegations of the petition are traversed in the answer of the corporation, and of Rice, who was made defendant, and notice of the fraud, and want of consideration charged on him before he purchased the property. The court below granted the relief sought, and Rice and the company prosecute separate appeals.

As to the company, it is satisfactorily made out by the evidence, that when the alleged insurance was made, that the requisite amount of stock had not been subscribed to authorize an election

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of officers and to organize the corporation for the transaction of business. Even if an available subscription of the real estate spoken of, by Dr. Beck, was made, its real value was never ascertained and fixed by the original corporators, nor by the board of directors claimed by appellants to have been elected; and the estimated values were fictitious, unreal, and delusive, and all the witnesses, except Dr. Beck, testify that the requisite amount of stock never was subscribed. One who had made an elaborate examination into the affairs of the concern says "about sixty dollars was all the real stock that was subscribed" and all except Beck concur in the statement that the pretended organization was without foundation, deceptive and fraudulent.

And that appellee was overreached, and deceived into the agreement to insure with Dr. Beck by his promises of dividends, and the illusive showing and misrepresentations of his printed declarations of the members, and officers of his concern, and business condition given to her, is fully established by the evidence.

For the want of the prerequisites for an organization of the company, without which it could not enter upon the transaction of business, and the fraud practiced, the contract with appellant "*The Kentucky Mutual Life Insurance Company*" was properly set aside by the court below.

Nor does the evidence allow an escape from the conclusion that Rice, at the time he entered into the contract of purchase had notice of the condition of his vendor, the means by which it acquired the property, and the want of consideration to uphold the transaction.

The deed to his vendor shows on its face that it was made in consideration of a policy of insurance of the life of the grantor. Beck proves he informed appellant, Rice, of the contract with appellee when he had the deed recorded, and other facts and circumstances proved remove all doubt of notice having been communicated to him before his purchase. And besides, he has only paid according to the evidence the one-half of the price *he* agreed to pay for the property, and that was not the one-half of the value recited in the deed of his vendor that it fixed on the property.

Perceiving no error in the rulings of the court below, the judgment is *affirmed* on the appeal of the "*Kentucky Mutual Life*

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Insurance Company," and also on the appeal of J. M. Rice against Jane Clark.

James, Brown, for appellant.

Ireland, Homeshell, for appellees.

GERTRUDE BELL, &C. v. J. T. MARTIN.

Injunction Bond—Liability On for Debt Lost.

Where the evidence shows that but for an injunction to prohibit a suit on a note, it could have been collected through the process of the court, the injunction bond will become liable for the amount of the debt.

APPEAL FROM HARRISON CIRCUIT COURT.

October 6, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The pleadings and evidence preponderate in favor of the conclusion that, had not Martin's suit on the note been enjoined, he would have obtained a judgment against the obligor, Blaydes, at the May term, 1868, and could, by execution, have made the whole amount of the judgment, and the facts authorize the deduction that, when the timely execution on the judgment obtained on the day of the dissolution of the injunction was delivered to the sheriff of Harrison county the remnant of visible property owned by Blaydes subject to execution had been removed to Bath county, whither he had transplanted his family. So that the return of "no property" was true, and there is neither proof nor presumption that if an execution had even been afterwards sent to Bath, anything would have been made by it.

It seems to this court, therefore, that the judgment on the injunction bond for the amount of the debt, thus apparently lost, was right, and it is therefore affirmed.

McClintock, for appellant.

Boyd & Cleary, and West, for appellee.

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E. CREEL'S ADMR. v. HILL & RAY.

Pleading—Petition—Sufficiency—Executors and Administrators.

A petition against an administrator, charging a sufficiency of assets in his hands belonging to the estate, to satisfy their claim, presents a cause of action, and is good on demurrer.

New Trial—Reversal for Error in Granting.

Where all the papers in a case shows no error against a plaintiff, but that all evidence objected to by him was rejected, all instructions asked for, given, it is error for the trial court to set aside the verdict of the jury, and grant a new trial.

APPEAL FROM MARION CIRCUIT COURT.

October 6, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

We think the petition of appellee, inasmuch as it charged that there was in the hands of the administrator of Mrs. Creel a sufficiency of assets belonging to the estate of Molly Miles to satisfy their claim, presented a cause of action, and that the demurrer thereto was properly overruled. Upon a careful examination, however, of the record, we have been unable to discover any error in the proceedings of the court below upon the first verdict and judgment prejudicial in the slightest degree to the interest of appellees. All evidence objected to by them was excluded from the jury, and all instructions asked for by them were given. The only instruction given at the instance of appellant in our opinion correctly set out the law of the case, and besides it does not seem to have been excepted to.

We are of opinion that the court erred in setting aside this judgment, and granting a new trial. And we reverse the judgment appealed from, and remand the case with instructions that all proceedings subsequent to the first judgment be disregarded, that said judgment be enforced, and that judgment be entered in favor of appellant for all costs accruing after the 28th day of August, 1868.

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Judge Hardin did not sit in this case.

R. & F., for appellant.
Noble, for appellee Ray.

HENRY COX v. G. H. PERRIN & OTHERS.

Vendor and Purchaser—Mortgage Lien—Notice.

The purchaser of lands, being advised that other parties held a mortgage on the property, made enquiry of them regarding same, and was informed that the mortgage had been settled by an arrangement between them and the mortgagor: Held, to operate as an estoppel of the mortgagees to foreclose their liens as against the purchaser.

Same—Pleading.

The failure of the purchaser of the land to rely upon this defense in his original answer to the foreclosure proceedings, held not to be a concession by the purchaser of the rights of the mortgagees to foreclose their lien.

APPEAL FROM HARRISON CIRCUIT COURT.

October 25, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The right of Cox to relief against the judgment subjecting his land to the payment of the claims of Perrin and E. D. Rowland against Hervy Rowland depend upon whether or not he was misled by them relative to the existence of their mortgage lien, and whether he was induced to make the purchase by reason of assurances upon their part that their said lien had been released. If when applied to by Cox for information, or at a time when they knew he was negotiating for the land, they made statements to him or in his presence, to the effect that their mortgage had been released and thereby encouraged him to purchase they ought not now to be permitted to deprive him of the benefit of such purchase in order to secure themselves from loss.

The circumstances proven in the case establish beyond cavil that Cox at the time of his purchase in December, 1863, was apprised

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of the fact that all the lands of Hervy Rowland were mortgaged to appellees.

Possessing at least ordinary business capacity it is but fair to conclude that when he was about to make his last purchase in May, 1864. Cox would take some steps before closing the contract and paying cash in hand, the entire purchase price to ascertain whether or not the title to the land had been cleared of the encumbrance which existed five months before. The evidence leads us to the conclusion that he did take the precaution to make inquiries relative to this matter of at least one of the mortgagees, when charged by Cox with having assured him before his last purchase that the mortgage had been released, Perrin utterly failed to deny the charge, when upon examination of the records, long after the purchase by Cox, he discovered the fact that the release did not embrace the lands he last purchased, he expressed surprise at the discovery, and stated that he had misinformed Cox as to the fact.

The conduct of Perrin and E. D. Rowland from 1864 down to the early part of the year 1867 can be accounted for only upon the hypothesis that they both believed that they had in accordance with their contract with Hervy Rowland released their mortgages upon all his lands, at the time of the first sale to Cox. Perrin so stated to J. W. Musselman in the presence of J. F. Musselman, and the statement of E. D. Rowland in the presence of Hill will bear no other plausible construction. The release executed on the 11th of May, 1867, to Hervy Rowland by Perrin and E. D. Rowland to render him a competent witness in their behalf in the litigation with Ammerman tends to strengthen this conclusion.

We do not agree with the circuit judge that the failure of Cox to rely upon this defense in his original answer, was a concession upon his part of the right of Perrin and E. D. Rowland to foreclose their mortgage, considering all the the circumstances connected with this original answer. We are inclined to the conclusion that Perrin and E. D. Rowland having (innocently perhaps) first misled Cox by representing to him that their mortgage had been released, were then attempting to take advantage of their failure to comply with their agreement with Hervy Rowland, and also to escape the consequences of the deception they had practiced upon Cox, by misleading him as to his legal rights as against them, hoping through him to be able to subject the note in Musselman's hands to the payment of their liabilities as the sureties

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of Hervy Rowland. It is seldom that statements *in pais* are conclusive upon the parties making them. But in this instance they were acted upon by Cox, and to permit them now to be denied, would be ruinous to the interests he acquired in the faith that they were true, and would in effect be a fraud upon him. It appears that Perrin and Rowland are able to pay the debts for which they are liable as the sureties for Hervy Rowland and that the creditor Smith is but a nominal party to this action, not seeking in good faith to be substituted to the rights of the mortgagees, no injury can therefore result to any creditor, whose debt was intended to be secured by the mortgage, and as we conclude that the mortgagees are estopped from asserting any claim under the same as against Cox, the judgment of the court below subjecting his land to the payment of the claims represented by them is reversed, and the cause remanded with instructions to dismiss their petition, to enforce the judgment in favor of Musselman, and for further proceedings consistent herewith.

J. B. Ward, Lindsey, for appellant.

Trimble. Ward, Johnson & Brown, for appellee.

SQUIRE LUCAS, &C. v. WM. ODER, &C.**Vendor and Purchaser—Fraudulent Conveyance.**

A vendor held possession of property until his death, when his administrator took possession of it: Held, that the fact that the title may have been originally vested in another, for some fraudulent purpose, was not an available defense to this action between claimants.

APPEAL FROM HARRISON CIRCUIT COURT.

June 4, 1869.

OPINION OF THE COURT BY JUDGE HARDIN :

Although it appears that Thomas Dum was the ostensible purchaser of the property in contest in 1834 or 1835, and although after his death, which occurred about February, 1837, his widow, who was the daughter of Thomas Oder, seems to have exchanged

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houses with her father and occupied the one in contest for about two years before her marriage with her second husband in 1844; the fact that during nearly the whole of the time from the purchase by Dum till the death of Oder in 1861 the latter occupied the property by himself or tenants as his own, generally, listed it for taxation, and considerably improved it, and other facts and circumstances, seem to us to sustain the conclusion that the property really belonged to Oder. Though there is some evidence that Mrs. Dum, while she occupied the property, claimed to do so in her right as the widow of Thomas Dum and not as the tenant of her father, yet it is proved by one witness that she said "*she could* claim the property if she was dishonest enough to do so, that it was deeded to her husband," etc.

As Oder held the possession of the property till his death when Lucas, who became his administrator, took possession of it, the fact that the title may have been originally vested in Dum, the father of Mrs. Lucas, for some fraudulent purpose was not, we think, an available defense to this action.

Wherefore, the judgment is affirmed.

A. H. Ward, for appellant.

..Trimble. for appellees.

H. GOODLOE'S EXOR. v. D. T. DAVIE AND A. C. COLLIER.

Estates Tail—Devise—Mutual Exchange.

A devise of lands was made, in trust for the devisees and their children during their lives, with power of sale by the trustee for re-investment, etc.: Held, to authorize a mutual exchange of the separate interests between the devisees.

Same—Re-Investment.

A re-investment of a surplus for one of the devisees, through her husband as trustee, held not improper.

APPEAL FROM WOODFORD CIRCUIT COURT.

June 10, 1869.

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OPINION OF THE COURT BY JUDGE WILLIAMS:

Appellants petitioned the chancellor to confirm a contract of sale and exchange between Mrs. Davie and her sister, Mrs. Collier, of land devised by their deceased father, in trust for them and their children during their lives, and then to their heirs, with power in the trustees to sell and re-invest the proceeds, etc.

A portion of the land was devised for life to the testator's widow. Mrs. Collier exchanged her interest in this dower land for her sister's interest in the other lands and gave \$2,000 difference in money. The chancellor confirmed the trade and directed the trustee, Stout, to convey Mrs. Davie's interest to Mrs. Collier, and appointed her husband, G. J. Davie, to invest the \$2,000 in lands in Tennessee, under the same restrictions imposed in the will, but Stout, the testamentary trustee, refused to make the conveyance and from the peremptory order directing him to do so he has appealed.

The judgment is virtually according to the prayer of the petition, save as to the substitution of Mrs. Davie's husband as her trustee in place of Stout, of which he does not complain.

The direction as to the conveyance of Mrs. Collier's interest in the dower land is not as specific as could have been desired, but this is still under the direction of the court, as he must approve the deed and should see that it is conveyed under the same limitations and with the same conditions unmixed as is imposed by the will on Mrs. Davie's interest. In a word, all the deeds both ways should be in strict accordance to the will, and then no alteration in the entail would be made. Of course this could only attach to one-third of Mrs. Collier's purchase of her sister, Mrs. Davie, as she pays two-thirds in money, and only one-third in land devised by her father, but as these things may yet be done, we see no reversible error in the judgment, and it is therefore affirmed.

Porter & Greathouse, for appellant.

W. C. Goodloe, for appellees.

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W. N. BROWN, &c., v. JAMES MURPHY.**Contractors—Breach of Contract—Damages—Criterion.**

In ascertaining the damages the owner of a dwelling is entitled to by the refusal of a contractor to complete the work on same, the criterion is to ascertain what it would cost to finish the house above the contract price, and if larger, the contractor would be responsible, but if no more, or less, the owner would be entitled to only nominal damages.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

October 7, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

In May, 1868, Wright made a contract in writing to furnish the material, and build a frame cottage for Murphy in the city of Louisville, of the size, and description specied in the writing, to be completed by the 20th of June, 1868, for which Murphy was to pay \$860. Immediately after the contract was made, Wright commenced the work, but early in June, after having furnished materials and done work of the value of \$363.67, as one witness proves, but only of the value of \$264 as proved by another witness, he, for some unexplained cause, abandoned the contract, made out an account for \$363.67 against Murphy, and assigned it to Brown, who sued Murphy in the Jefferson court of common pleas on it.

Murphy answered, and after denying that he was indebted to Brown, or White, his assignor, in any sum whatever, and denying that Wright had done any work, or furnished any materials for him, he then, in a separate paragraph, alleges he made a contract with Wright for the building of a cottage house of the description and upon the terms stated, that Wright had failed to finish the house, and refused to progress with the work, that he had caused an estimate of the materials furnished, and a valuation of the work done on it, when Wright abandoned it to be made by one Shryock, a city measurer of mechanical work in the city, and the whole, according to his estimate and valuation, was worth only \$264.37, and that he estimated that it would cost \$900 to finish the house in the manner and style stipulated in the contract, which

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estimates and valuations he filed with his answer, they having been made out in writing and signed by Shryock, and averred that he had been damaged *three hundred dollars* by the failure of Wright to complete the building, prayed judgment for that sum, and made his answer a counterclaim against Wright.

On Murphy's motion, the suit was removed to the Louisville chancery court, and that court dismissed Brown's petition with costs, and rendered judgment in favor of Murphy against Wright for \$140 on the counter-claim, from which Brown and Wright both appeal.

Shryock's deposition was taken by appellee, and he proves that his estimates and valuations referred to, and filed with appellee's answer, are correct and that it would cost him \$900 to have his building completed, and in his deposition, he says the materials furnished and work done by Wright were worth *about* \$200, from which it would appear that he undertook to do the work for \$240 less than it was worth, and if he had finished it, he would have lost that sum. In Shryock's estimates and valuation of the materials and work done, and which appellee makes a part of his answer, and adopts as correct, he fixed their value at \$264.37, now deduct the \$240, the difference between the price he contracted to do the work for, and what it would cost to finish it, and it will leave \$24.37 in favor of Wright and that deducted from the \$100 appellee had paid him, it would leave only \$75.63 in favor of appellee, instead of \$140, for which the judgment was rendered, consequently, it must be erroneous, for the correct criterion to ascertain the damage that appellee has sustained by the breach of the contract by Wright is to ascertain by evidence what it would cost to finish the house over and above the price Wright contracted to build it for, and if it would cost any more, that additional cost Wright should pay, but if others would do it for the same, or a less price, then appellee is not damaged beyond mere nominal damages.

The sum of \$75.63 is arrived at from Shryock's measurement, and mode of estimating the injury appellee has sustained. But Lawes estimates the materials and labor of Wright at \$100 more than Shryock, and Connor, one of appellee's witnesses, proves that he actually finished the house at the agreed price of \$114, but did not get that, appellee only paid him \$112 and he gave him a receipt in full. This substantive fact, although in conflict with

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the theory of an official, is entitled to consideration, in making up the estimate of what would be the difference between the cost of finishing the work, and the price Wright *contracted* to finish it for. This witness may not have intended all his evidence imparts, but he was not re-examined, so as to let him explain what he had said, and this court must take the evidence as it is.

Wherefore, the judgment is *reversed*, and the cause is remanded with directions to refer the case to the master to ascertain and report the facts and state the accounts of the parties on the principle herein set forth and for further proceedings consistent herewith. The witness to be re-examined, and such other evidence to be heard as either party may desire.

Barnett & Edwards, for appellant.
Mix, for appellee.

T. C. S. THOMAS v. S. S. SIZEMORE.**Injunction—Dissolution—Dismissal of Petition.**

When, on the dissolution of an injunction by the lower court, the petition is dismissed, a Judge of the Appellate Court has no power to re-instate the injunction.

Principal and Surety—Limitation—Assignment of Judgment.

The assignment of a judgment on a note will not operate to arrest the running of the statute of limitations in favor of a surety, though the assignee may not have known that the creditor was not the principal in the note, but only a surety.

APPEAL FROM HENDERSON CIRCUIT COURT.

October 26, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

When the injunction was dissolved, the petition was dismissed, which made it a final judgment, and a judge of this court has no authority to reinstate an injunction when the case was finally disposed of.

It is clearly established by the evidence that appellant was only

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the surety in the note upon which the original action was brought, and more than seven years having elapsed without suing out an execution on the judgment, was exonerated from the payment of the debt under the statute, *2 R. S., 400*.

Nor can the fact that the judgment had been assigned to appellee who may not have known that appellant was not a principal in the note, prevent his exoneration, as was ruled by this court in *Day vs. Billingsley, 3 Bush, 157*.

Wherefore the judgment must be reversed, and the cause remanded with directions to render judgment perpetuating appellant's injunction, and for further proceedings consistent herewith.

Vance, for appellant.

Sizemore, for appellee.

MARY ANN HASLAM v. GIDEON WALKER'S EXR., &C.

Legacy—Sale—Unfair Advantage.

When a legatee sought out and induced, through her agent, the sale of her legacy, though for a grossly inadequate amount, such sale will not be disturbed in the absence of fraud.

APPEAL FROM LOUISVILLE CHANCERY COURT.

October 5, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

In this case there is no evidence tending to the conclusion that any improper means whatever were used by any one to influence appellant to make the sale and transfer of her legacy. It does not appear that the purchasers either saw or made any statements to her directly or indirectly on the subject, but it does appear that her wish to sell was communicated to appellees by her confidential friend and adviser Field before they had expressed any desire or intention to purchase; that Field and herself fixed a price that she was willing to take, and Field told appellees what that price was; they declined to pay that sum, and offered \$400, which after consultation with Field, appellant consented to take,

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her willingness to take it was communicated to the purchaser, the contract was thereupon concluded, and the money paid.

There is not only no evidence of any unfair or improper means used by appellees to procure the contract, but the evidence shows it was sought of them, that it was made by appellant in the exercise of the utmost freedom, and with parties whose conduct as far as developed by this record is without reproach.

Wherefore, the judgment must be affirmed.

E. S. Worthington, for appellant.

Mix, Caldwell, for appellees.

AUGUSTA FREDERICK v. B. K. BETHUREM, &C.**Equity—Judgment—Enforcement.**

In an equitable action to enforce a judgment, the action becomes a binding obligation against the defendants from the date of their answer admitting liability.

Same—Payment to Third Party.

Such answer becoming the nature of a garnishment proceeding, a payment by the defendant to any other than the petitioner, outside of court, will not affect the right of the petitioner to recover the amount against the defendant.

Same—Notice.

Such proceeding would be notice of the claim of the petition, as against subsequent creditors.

Bills and Notes—Principal and Surety—Release of Surety—Limitations.

The limitations of seven years in favor of a surety will not apply where an execution against the surety alone, was issued within the statutory period.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

October 25, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Appellant having recovered a judgment against Josephine Frederick and others for \$75 and having had one execution

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issued thereon and returned no property found by the proper officer, filed her petition in equity to attach the amount of her debt in the hands of W. H. Kirtly and appellee Berthurem alleging that they were indebted to Josephine Frederick alleging in a larger sum than she owed them. In September, 1859, Kirtly and Berthurem answered her petition, in which they admit an indebtedness and a judgment against them in favor of the said Josephine in a sum sufficient to pay the debt, and say "*they care not who gets it.*"

Judgment was on the 9th of March, 1861, rendered in said suit in favor of appellant against Kirtly and Berthurem for her debt and costs. In June, 1866, an execution issued on said judgment against the estate of Bethurem (Kirtly having died); and was returned, the individual to whom it was delivered doubting whether he was in fact sheriff of the county, and his authority to act in that capacity.

On the 17th of April, 1867, another *fifa* issued on said judgment and was levied on the property of appellee; before the sale he enjoined the collection of the debt, alleging that Josephine Frederick had recovered judgment against Kirtly and himself, he being the surety of Kirtly; that an execution issued thereon; that they then replevied the debt, and after the replevin bond matured, an execution issued, and property of Kirtly was levied on, and not sold for want of bidders; that a *ven. ex.* then issued, and upon that Kirtly paid the debt.

He also pleads that he was only the surety of Kirtly, and as such he is discharged by time, and pleads the statute of limitations.

The court below was of opinion the debt had been paid to Josephine Frederick by Kirtly, and perpetually enjoined the judgment of appellant, and by this appeal she seeks a reversal of that judgment.

The debt, it is true, was replevied after appellant filed her petition to attach as much of it as would pay her debt, and the *fi fa* issued thereon was levied on Kirtly's property; but he and appellee had filed their answer admitting an indebtedness, and if they paid the money to Josephine, or on her execution after that they did it at their own risk. They should have taken steps to arrest the collection of so much of the debt as was attached

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by appellant and a payment afterwards to Josephine, would not discharge them from their liability to pay her.

The execution was issued on the judgment against appellee which he enjoined in less than seven years before the statutory bar was complete.

Wherefore, the judgment must be reversed, and the cause remanded, with directions to dissolve the injunction and dismiss appellee's petition.

Dembitz, for appellant.

Hoham & Kirtly, for appellees.

MARSHALL BRAGO & WIFE v. WM. S. SMITH.

Pleadings—Petition—Parties to an Action Respecting Title.

Where a petition charges a fraudulent transfer of lands to A, held, that A must be made a party to the suit.

APPEAL FROM METCALFE CIRCUIT COURT.

October 14, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

As the petition charged that the legal title had been fraudulently conveyed to Mrs. Bragg, she was a necessary party to the suit for setting it aside. She does not appear to have been made a party, and the decree therefore vacating her deed and subjecting the land cannot affect her title.

Wherefore the judgment is reversed, and the cause remanded for further proceedings.

James, for appellant.

Dohoney, for appellee.

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WM. BERRY'S ADMR. v. CALEB RATCLIFF, SENT.

Bills and Notes—Note by Corporation—When Individual Note of Obligor.

A note signed by a corporation, by A and B, as officers, but in the body of same using the word "we," held, to convey an individual liability of the officers signing same.

Same—Consideration.

A purchase of a right-of-way for a corporation, held, to be sufficient consideration to uphold a note given by the individual directors of the corporation.

APPEAL FROM BATH CIRCUIT COURT.

October 7, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Although the payees of the note executed to Ratcliff on the 15th of March, 1867, describe themselves as president and directors of the Sharpsburg and Owensville Turnpike Company it is evident from its wording that it was intended that it should be their personal obligation. The circumstances under which it was made indicate that Ratcliff would not have accepted the obligation of the company in discharge of his claim. This fact was understood by Berry and the pronoun "*we*" was used in the body of the note for the purpose of making it the individual undertaking of those who signed it, and in our opinion it had that effect. The plea of want of consideration cannot be sustained. The right of way over the eleven acres of land and the one of the stone quarry constitute a sufficient consideration to uphold the note. The Turnpike Company was not divested of any part of this consideration by the sale of the land to Gasset nor of Gasset's sale to Marshall. They both seem to have had notice of the rights acquired by the company under their written agreement with Ratcliff submitting the question of damages on account of the stone quarry and right of way over the land to referees. And Marshall in his deposition taken in this case states that the company is now in the enjoyment of all they acquired from Ratcliff, and expressly recognizes their right to the same.

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The judgment of the court below is affirmed.

Nesbitt & Gudgell, for appellant.

Holt, Hurt, for appellee.

G. L. BOURBON v. MARTHA PORTER & OTHERS.

Vendor and Purchaser—Notice of Deraignment of Title.

The purchaser of property, with notice of the deraignment of title, assumes the risk subsequent thereto.

Same—Payment of Purchase Money.

Nor can he escape the payment of purchase money notes therefor, especially when he refuses a rescission of the contract, and seeks to stand on a warranty of title.

APPEAL FROM HOPKINS CIRCUIT COURT.

October 31, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The evidence in this case does not warrant the conclusion that Mrs. Porter “artfully concealed” from Bourland the true character of her title to the house and lot for which the notes sued on were executed, and when interrogated upon that subject, she promptly informed him that she derived title through her husband’s will. And her acquiescence in the opinion expressed by her attorney as to the title vested in her by said will, was neither fraudulent nor artful.

Bourland having accepted a deed containing covenants of warranty, could make no available defense to the payment of the purchase price, unless he could show that his vendor was either a non-resident or insolvent. The latter fact was charged to exist, but there was not one word of evidence to sustain the allegation.

The judgment of the circuit court giving Bourland the right to rescind the contract of sale in case he chose to do so, was more favorable to him than he had the right to expect, and having declined to avail himself of that privilege he has no legal or

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equitable ground of complaint at being compelled to pay the notes executed for the purchase money of the house and lot. Judgment affirmed.

Waddell & Pratt, for appellant.

Drane, for appellee.

BARKER v. HUNDLEY.**Execution—Sale by Sheriff.**

In the absence of an express stipulation in an execution from the court, as to a sale for "cash," the return of the Sheriff that the sale was made for cash, is presumptive evidence that he did not exceed his authority.

APPEAL FROM FAYETTE CIRCUIT COURT.

October 17, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The only evidence before this court as to the authority of the sheriff to make the sale of Richard Hundley's land, and as to the question of whether he sold more land than he was authorized to sell is the return made by him upon the execution issued from this court. From this return it appears that he levied upon the land to satisfy said execution, and also another execution issued from the Fayette circuit court in the same case, and that the "same land and other lands were levied on and offered for sale at the same time and place subject to this prior execution" that the sale was made for *cash*, and that after satisfying this execution he applied the remainder of the money realized from the sale as a credit on the execution issued from the circuit court.

It is claimed that the execution issued from the circuit court did not authorize him to sell for *cash*, and that this cash sale, in so far as it exceeded the amount of the execution issued from this court, was unauthorized and void, and hence that too much land was sold. The evidence before us does not show that the circuit court execution did not authorize a sale for cash. And we pre-

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sume that the sheriff did not exceed his authority. The motion to set aside the sale is overruled.

Breckinridge & Buckner, for appellant.

JACOB T. BURKHEAD v. E. S. STUART ET UX.

Husband and Wife—Separate Estate—Proof.

A married woman, to escape liability for an incumbrance of her estate by herself and husband, must show by proof, by an exhibition of her title to same, as her separate estate.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

October 6, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The incorrect statement in the note of Stuart and wife to Hays, that the consideration was "for necessities" furnished, seems to have been the result of some purpose to evade the statute exempting the estates of married women from liability under their ordinary simple contracts; but it clearly does not appear that Mrs. Stuart was deceived as to the object of this device, nor that she did not understand and approve of it as a means of raising money by creating a debt which might be enforced. But she had a right to unite with her husband in an ordinary mortgage of her general property even for a debt of her husband, as this court has heretofore expressly decided, and although it is alleged in her answer that the land embraced by the mortgage was her separate estate, she wholly failed to show that fact, by any exhibition of her title, and the absence of such evidence this court must presume that the title to the land was such as the grantor might lawfully convey by mortgage.

The judgment must, therefore, be reversed; but further preparation should be allowed on the return of the case.

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Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

I. R. Greene, for appellant.

Sanders, for appellees.

H. T. CROWDUS v. COMMERCIAL BANK.

Principal and Surety—Release of Surety—Notice to Judgment Creditor to Proceed.

After notice given a judgment creditor, under sec. 10, ch. 97, R. S., unless proceedings by execution be issued within ten days after such notice, the surety will be released.

Same.

The notice must state that the giver of same was a surety, co-surety or co-obligor.

APPEAL FROM MARION CIRCUIT COURT.

October 12, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

At the February term, 1865, of the Marion circuit court the Commercial Bank of Kentucky recovered judgment against James and Henly T. Crowdus for the sum of \$6,373.80, with interest and costs, subject to a credit of \$794.68, the balance due on a bill of exchange drawn by appellant H. T. Crowdus, accepted by James Crowdus and endorsed to said bank by M. W. Crowdus. At a prior term of the court judgment had been rendered on said bill against the endorser M. W. Crowdus. Upon this judgment execution was regularly issued, and under it, the certain lands of M. W. Crowdus were levied upon and sold, for an amount sufficient to satisfy the judgment. The purchaser executed sale bonds as prescribed by law. Shortly after this sale Bannister brought a suit in equity in the Marion circuit court, alleging that M. W. Crowdus had conveyed certain of his property to Harrigan and others for the purpose of preferring creditors and in contemplation of insolvency, making the Commercial Bank and various

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other creditors defendants, and asking to have his estate distributed as provided by the act of the Assembly, approved March 10, 1856. In this action it was adjudged that the conveyance was made to prefer creditors and in contemplation of insolvency and as the levy and sale of the lands taken made the execution in favor of the Bank, were made subsequent to the date of said conveyance. The same were disregarded by the court, and the land sold by its commissioner and the proceeds adjudged to be distributed among the various creditors who had proven debts against the estate of said M. W. Crowdus, among whom was the appellant H. T. Crowdus. This judgment having been affirmed by this court, the purchasers at the execution sale made a motion in the circuit court to have their sale bonds cancelled, which was done, and the Bank ordered to pay back to one of them an amount that had been paid on the purchase. Bannister, in the same action, prosecuted against James Crowdus, who it seems had conveyed a portion of his estate for the same purpose, and with like result. The amount received by the bank out of the property subjected by the court in this proceeding reduced their debt to something under \$2,500, and to secure the judgment of this amount, they brought suit on the 26th of February, 1869, against appellant, setting up all these facts, and that a large amount was due him on account of claims filed against the estates of M. W. and James Crowdus in the proceedings heretofore set out, charging him to be otherwise insolvent and a non-resident, and attaching in the hands of the court's commissioner the amounts due him as aforesaid. Appellant answered, setting up the execution sale of the lands of M. W. Crowdus and claiming that the same extinguished the judgment and released him from all further liability to the bank. Also that he was an accommodation drawer of the bill of exchange, and therefore only a surety, and that the bank had failed for more than ten years to issue executions on these two judgments, after the sale had been set aside and the sale bonds cancelled, although twice notified in writing to do so, and that by reason of such failure he was released from further liability.

The court disregarded both these defenses and rendered judgment in accordance with the prayer of appellee and from said judgment this appeal is prosecuted. It is unnecessary to discuss the first ground of defense, as we regard the last as available. Section 10, chapter 97, Revised Statutes, provides that a surety,

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co-obligor, or co-contractor, etc., may by notice in writing served on the plaintiff or his attorney, require him to issue execution, and that if he shall not within ten days thereafter sue out execution and in good faith prosecute the collection thereof, "such co-surety," co-obligor, or co-contractor, or defendant shall be discharged from all liability as such, except for the proper share of such co-obligor, co-contractor, or defendant, according to the then existing condition of the several obligors, contractors or defendants." The statute is imperative. The plaintiff must sue out execution or the surety will be released. The testimony of James Crowdus establishes the fact that appellant was an accommodation drawer of the bill of exchange, and therefore only a surety. The notices served upon the president and attorney of the bank gave him this information, and as execution could have been issued upon both, the first and last judgment after the sale bonds were cancelled and the levy and sale set aside. We are of opinion that the failure of the bank to comply with the statute operated as a release of all further liability on the part of appellant. This being true, the judgment so far as it holds appellant responsible to the bank is reversed, and the cause remanded with instructions to dismiss appellees petition.

Harrison, for appellant.

R. & F., for appellee.

J. J. PRITCHOTT, & CO., v. WM. S. HUMPHREY.**Lien Bond—Assignment—Lien for Unpaid Purchase Money.**

The assignor of a title bond must not, in the absence of any express stipulation to the contrary, be regarded as having reserved his right to retain a lien, unless it be stated in the assignment what part of the consideration remains unpaid in express terms.

Same.

It not appearing that the assignment of a bond, contained an express stipulation for reserving a lien for the note, nor even that a purchaser thereunder had notice, held, that no lien would attach thereon.

APPEAL FROM MUHLENBERG CIRCUIT COURT.

October 26, 1870.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE HARDIN:

H. D. Rothrock, holding by assignment from James W. Sullivan, the bond of John E. Reno for title to a store, house and lot, in his possession, in South Carrollton, sold the property to L. W. Knicholas, and transferred the bond by assignment to him, and in consideration thereof, Knicholas gave his note to Rothrock for \$600, and the latter transferred the note by delivery to William S. Humphrey; and Knicholas having sold the property to J. J. Pritchott and Louis Robertson, and assigned the bond to them, this suit was brought by Humphrey, asserting and seeking to enforce a vendor's lien on the property for his debt. And the court having adjudged that relief and directed a sale of the property to satisfy the debt, Pritchott and Robertson have appealed to this court.

It does not appear that the assignment of the bond from Rothrock to Knicholas contained any express stipulation for reserving a lien for the note in controversy, nor even that the appellants had notice when they afterwards purchased the property and accepted Knicholas' assignment to them, that he had not paid the consideration of the assignment of Rothrock to him.

Before the adoption of the Revised Statutes, the right of an assignor of a bond for title, to a lien for the consideration of his assignment, as against a remote assignee of the same bond, with notice, was only recognized in analogy to the lien of a vendor by an absolute conveyance; and the same analogy being preserved, since the change in the mode of reserving liens affected by section 26, of chapter 80, of the Revised Statutes, the assignor of a title bond, must not in the absence of any express stipulation to the contrary, be regarded as having reserved his right to retain a lien, unless it be stated in the assignment what part of the consideration remains unpaid in express terms (*Taylor v. Ford, &c.*, 1 Bush, 44).

The assignment of the bond, by Rothrock to Knicholas, therefore imparted no lien on the property which should have been enforced in this action.

Wherefore, the judgment is reversed and the cause remanded for a judgment not inconsistent with this opinion.

Eaves, for appellants.

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ELIJAH LEAR, &CO. v. MIKE RAY, &CO.**Principal and Surety—Assignment to Surety of Debt Paid.**

The assignment by a judgment creditor of the debt to a surety paying same, does not preclude the surety from prosecuting an action thereon, on the ground that he cannot be the assignee of a debt against himself, and a payment of the judgment by the surety extinguished the debt. Sec. 8, ch. 97, Rev. St. 2, vol. 398.

Same—Co-Surety in Supersedeas—Right to Contribution.

A surety in a supersedeas bond, to stay execution on a judgment against a principal and sureties on a note, who had taken indemnity from the principal, is held to have executed the supersedeas as the principal above, and could not, by paying the debt, acquire any right of remuneration from the original sureties.

Same—Rights of Original Sureties—Liability of Sureties in Supersedeas Bond.

A supersedeas bond for a principal debtor was executed, thereby causing delay in the collection of the debt. Pending the action, the debtor disposed of his property, and the original sureties on the note were compelled to pay the debt. Held, that the sureties in the supersedeas bond were liable to the original sureties for the total amount of the debt paid by them.

APPEAL FROM GARRARD CIRCUIT COURT.

October 1, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

In October, 1867, W. M. Totten, with appellees as his sureties, executed a note to W. M. Kirby for \$3,000, due one day after date. After it matured, Kirby brought suit on the note in the Garrard circuit court. Totten alone attempted to defend the action, filed an answer and moved to continue the cause; but his motion was overruled, and judgment rendered against all the defendants for the debt. Totten, it seems, then had sufficient estate to satisfy the judgment, but he prosecuted an appeal to this court, and superseded the judgment by executing bond with appellants as his sureties. The judgment was affirmed, the mandate of this court entered, and an execution issued against Totten and appellees to enforce the collection of the debt; and it is

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alleged that Totten had in the meantime disposed of the greater part, or perhaps all, of his estate; that he had mortgaged a valuable tract of land to appellants (who were his brothers-in-law) when they executed the supersedeas bond aforesaid as his sureties, to indemnify them, and that if they had not by the execution of said bond prevented an execution from issuing on said judgment, the debt would have been made out of the estate of the principal, and that after the affirmance of the judgment the debt could not be made out of Totten's estate by reason of the encumbrance of their mortgage on his land, which, as is alleged, was taken with the fraudulent design to cover up and protect the land from levy and sale, and to compel appellees to pay the debt, or the unpaid balance of \$2,278.28, it having been reduced to that sum by a sale of Totten's property. That they had been compelled to pay said sum of \$2,278.28 to the creditor Kirby, which they did on the 24th of May, 1869, and took an assignment from him of so much of the judgment, which assignment they exhibit, and by the suit seek to compel appellants to refund to them said sum with its interest, etc.

After their demurrer to the petition was overruled, Logan & Lear filed an answer, making it a cross-petition against Totten, etc. In which they deny in general terms any knowledge of the value of the goods withdrawn by Totten on the dissolution of the late mercantile firm of which he was a partner, and allege that said firm was largely indebted to Totten. They deny that they combined with Totten to hinder or delay the collection of the judgment in favor of Kirby, further than the execution of the supersedeas bond might stay the proceedings, and allege that they believed when said bond was executed, that they were to be bound for all of the defendants in said judgment. Who they believed were good for the debt, but out of abundant caution took a mortgage on the land mentioned from Totten, to secure them, and have never refused to release it; admit that the debt can not be made out of Totten's property without a sale of the land, and allege that to have made the money out of his estate before the appeal was prosecuted, his land must have been sold.

They admit that they executed the supersedeas bond, but deny that they did it with any fraudulent design to aid him in the removal of his property from the reach of his creditors; and deny that they are responsible to appellees for what they have paid to

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Kirby on said judgment; but aver that in order that a multiplicity of suits may be avoided, and that justice may be done, they pray for a settlement of the accounts of Totten with his late partners in the mercantile firm, and that their mortgage may be foreclosed, and to that end make their answer a cross-petition against Totten and his wife, who, they allege, set up some sort of claim to the land.

Although a demurrer was filed to the answer by appellants, the same does not appear to have been disposed of. And so much of the case as involves the question of the responsibility of appellants to appellee was heard on the merits which was decided by the court below in favor of appellees, and of that judgment appellants now complain.

The first objection made to the judgment is that appellees can not maintain this suit on the assignment of the creditor, because they can not be the assignees of a debt against themselves, and that the payment by them of the exact amount due to Kirby extinguished the debt.

The answer to that argument is that Kirby by his assignment did precisely what the law required him to do; they were, as is admitted, the sureties of Totten on the debt to him. By section 8, chapter 97, Revised Statutes, 2nd volume, it is provided that where the surety pays the whole or part of a judgment or decree, he shall have a right to an assignment thereof from the plaintiff, or the plaintiff's attorney, etc., whereby he acquires a right to sue out an execution, or use any legal or equitable remedies that the creditor could have used, or resorted to, in order to have satisfaction of the debt.

And this is also an answer to the second objection of appellants to the judgment.

But the real controversy in this case is whether appellees, whose obligation as sureties was coeval with the debt itself, having paid the debt, can compel appellants, who came in as sureties for the principal debtor in the supersedeas bond, executed after the judgment and incidental to the prosecution of the legal remedy by the creditor to subject his property to the payment of his debt.

It is evident not only from the obligation which appellants took upon themselves, but from the mortgage also, that they executed the bond as the surety of Totten alone, trusting to him and his property for their indemnity, and they could not by paying the

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debt acquire any right to remuneration from the original sureties for whom they had incurred no liability.

When appellants executed the bond the principal debtor had sufficient property unincumbered to satisfy the debt; by that act they produced the delay, and procured the incumberance on his property, whereby the sureties in the original obligation were compelled to pay the creditor; and it seems to us equitable, just, and consistent with authority, that appellants should be made responsible to appellees for the amount they have paid to Kirby. *Patterson v. Pope*, 5 Dana, 241; *Bohannon v. Combs*, 12 B. M., 563; *Kouns v. Bank of Ky.*, 2 B. M., 203.

Nor do we perceive any error in the refusal of the court below to submit the case to a jury; the suit was brought in equity, and while the court might refer an issue of fact to a jury out of chancery, it is discretionary with him to do so, and if he refuses, it is not an available error for which this court will reverse.

Judgment affirmed.

Anderson, Burton, for appellants.

Owsley & Burdett, for appellees.

DAVID LAWRY'S ADMR. v. R. G. BEVERLY.

Executors and Administrators—Set-off Judgment.

In an action by an Executor on notes, a judgment on a set-off should be, to be levied of assets which might come into the hands of the Executor to be administered.

Same—Judgment de bonis propriis.

To authorize a judgment de bonis propriis, against an Executor, the answer must allege assets in his hands to be administered, and that the Executor has been guilty of a devastavit.

Same—Evidence of Payment for Intestate.

Payment of judgments enjoined by an intestate, must be shown by proper evidence to have been made with the consent of intestate, or by his request, or that they were debts the payer was legally bound to discharge.

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APPEAL FROM HENDERSON CIRCUIT COURT.

October 27, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought by appellant in her character of administratrix on two notes executed to her intestate by the appellee, the claims pleaded as set-off are all against said intestate, and still judgment was rendered against appellant *de bonis propriis* for \$351.22, with interest from the 11th of January, 1864, till paid and costs, although it is not alleged that appellant was guilty of a devastavit, nor that there were assets in her hands to be administered, even, therefore, if on the evidence a judgment was proper to be rendered against her, it should have been to be levied of assets, which might thereafter come to her hands to be administered. *Bolts' Admr. v. Fitzpatrick*, 5 B. M. 397. For that error the judgment must be reversed.

There are also other reasons why the judgment can not be sustained. In the answer it is alleged that \$502.86 was paid on two judgments against intestate in favor of the Henderson & Nashville Railroad Company, on which executions issued, that they were enjoined by intestate, and afterwards said injunctions were dissolved, and appellee paid the amounts thereof. Copies of said executions were filed which show by the sheriff's endorsement that he had returned them because they had been enjoined, and receipts to appellee are given on said executions long after they had been returned, by one Henry as president of said railroad company.

By appellant's reply to the answer all the claims to the set-off are thoroughly traversed, and consequently it was scarcely sufficient, to authorize the credit, to produce Henry's receipts on executions which had months before been returned as enjoined, and although a copy of the order dissolving the injunction was produced, no evidence was offered that the payments were made with the consent, or by the request of intestate—or that they were debts he was at the time bound to pay.

The amount of the revenue and city tax on the lot leased to appellant's estate, according to the evidence of Walden and Rentlinger, the only two witnesses examined on the subject, would be for five years, only \$16, when the term charged for is only three

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years; but this tax as charged in the account is \$38.75, which is an apparent error; the receipts for the payments would be the most satisfactory evidence, it seems that appellee got a credit for the whole \$38.75.

Nor was the evidence sufficient to authorize the credit for \$258.06 "*bill of iron from Pittsburg, February 9, 1861.*"

Reynond, the only witness who speaks of the iron, says his recollection is that Mr. L. Lawrey spoke to Mr. R. G. Beverly about sending for a bill of iron to Pittsburg, Pa.; whether Mr. Lawrey's request was complied with I know not; the claim should not be allowed on such evidence.

As the case had been transferred to equity, it would seem proper to have referred it to the master, to audit and state the accounts between the parties. The credits endorsed on the notes are charged in the account, and it does not very distinctly appear whether they are not twice allowed, and this court has no time to undertake the statement of accounts, a duty which properly belongs to the master.

It may be presumed that the account with appellee was created by intestate by reason of the indebtedness of the former, and with the mutual understanding that for goods furnished, and money paid for intestate appellee should be credited on the notes, and the statute of limitations would in that case be unavailing.

But for the reasons herein stated the judgment must be *reversed* and the cause remanded with directions for further proceedings, and the parties should be allowed to make additional proof, if it should be desired.

Turner, for appellant.

Vance, for appellee.

WASHINGTON WATSON, &C., v. EDGAR NUDHAM.**Bonds—Principal and Surety—Appeal Bond—No Supersedeas Issued.**

The mere execution of a supersedeas bond, without the issuance of the order of supersedeas, will not render the sureties liable for costs in the previous suits and rents and damages for being kept out of the possession of the property in litigation, during the pending of the appeals.

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APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

June 17, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

In a suit in equity in the Louisville chancery court, between opposing members of a disrupted congregation of colored Methodists for the possession and control of a church edifice, from the use of which each party sought to exclude the other, two supersedeas bonds were executed by the appellee, as surety for the most unsuccessful party, in substantial conformity with the provisions of section 887 of the Civil Code of Practice, as prerequisite to the obtaining of writs of supersedeas to stay the enforcement of judgments rendered in the cause. The contemplated appeals were both unsuccessfully prosecuted, one of them being dismissed for want of jurisdiction in this court, and the other resulting in an affirmance of the judgment which the appellants sought to have reversed; but no supersedeas was issued in either appeal, as required, to stay the proceedings of the chancery court (Civil Code, section 886).

This action was instituted against the appellee as surety in said bonds for the recovery of costs expended in the previous suit, and rents and damages for being kept out of the possession of the property during the pendency of the appeals in this court.

The principal ground of defense relied on by the defendants was one of law. That the mere execution of the bonds did not have the effect of superseding the judgments, and no orders of supersedeas having been issued, the execution of the bonds interposed no obstacle to the enforcement of the judgments, and therefore did not operate to devolve any responsibility on the defendant. With an agreed statement of facts the cause was submitted to the court for trial without the intervention of a jury; and a judgment was rendered dismissing the petition; and to reverse that judgment this appeal is prosecuted. There is no evidence conducing to show that the appellees agreed to waive the issual of orders of supersedeas, or that they accepted the bonds as common law obligations, for their security in the event of the unsuccessful prosecution of the appeal.

In the case of *Reed v. Lander*, 5 Bush, 598, this court held that neither the order of appeal nor the execution of an appeal

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bond constituted a supersedeas, and hence the judgment not being suspended, because the proper order of supersedeas was not issued, ten per cent damages could not be awarded on its affirmance by this court.

In this case the stipulations of the bonds are substantially the same in relation to rents, damages and costs, and we are unable to see how the surety can be exempt from responsibility for damages, and yet liable on his bonds for rents or costs; and especially so, as no sufficient reason appears for giving effect to the bonds as common law obligations.

Wherefore, no error being perceived in the judgment, the same is affirmed.

Harrison, for appellant.

Harlan & Newman, for appellee.

JOHN WESTERMAN v. GOTTLIEB LETTERLE, &C.**Pleadings—Guardians and Ward—Right to Bring Action.**

A petition by a ward to ascertain how funds were being held by a guardian, what disposition had been made of the same, the amount due each ward, and to enforce payment, held, sufficient allegations to authority bringing the action, and uphold a judgment for the true amount when ascertained, against the guardian and his sureties. ..

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

June 26, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The ground mainly relied upon for a reversal of the judgment in this case is that it was not authorized by the pleadings.

The petition charges that a portion of the money or funds which came to the hands of Billings as administrator he had charged himself with as guardian of plaintiffs and the balance he still retained as administrator of the father of plaintiffs, but that they had no means of ascertaining the respective amounts.

It is certainly true according to the evidence that the portion

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of the funds to which appellee John M. Letterle was entitled, Billings held as administrator, for it does not appear that he ever had a guardian, and he had attained the age of 21 years before Billings settled his accounts with the county court, and the portion of the funds to which the wards of Billings were entitled he had charged himself with as guardian; but that they were so held by him, it does not appear that the wards knew. This suit was brought to ascertain how they were held, the amount due to each of the appellees, and to enforce payment.

The allegations must be regarded as altogether sufficient to institute an investigation to ascertain in what character Billings held the funds and to uphold a judgment for the true amount when ascertained against Billings and his sureties respectively for the amount held by him as guardian against him as such and the surety on his guardian bond, and for the amount held by him as administrator, against him as such, with his surety on his administration bond, and so the judgment was rendered.

The facts stated in the affidavits filed by appellant for a rehearing of the case, if admitted, do not constitute a good defense to this action, for having charged himself as guardian with the funds, whatever disposition Billings may have made of them after that, could make no difference, his surety as guardian would be responsible to his wards; but whether or not Driesback would be responsible to appellant, if the money of the wards was put into the late firm of Billings & Driesback and used by that firm and Driesback knew at the time it was their money, is a question not made by the pleadings, and not before us for determination.

The allegations of the petition being sufficient to uphold the judgment, which is fully sustained by the evidence, it must be *affirmed*.

Muir & Bijur, Gaertmell, for appellant.

T. W. Gibson, for appellee.

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THOMAS FLORENCE v. W. L. TROUTMAN'S ADMR., &C.

Parties—Heirs Made Parties to Close Mortgage Claim.

Where a party purchases land at a decretal sale, agreeing that the mortgagor shall have the right to redeem, and later transferred his claim to the purchase to a third party, in an action by the latter to foreclose, the heirs of the original purchaser must be made parties.

Lien for Purchase Money.

Transfer to third party, does not pass title.

APPEAL FROM HARDIN CIRCUIT COURT.

December 7, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

We think there can be no doubt of the fact that it was agreed between Troutman and Florence before the sale made in satisfaction of the judgment in favor of Brown and others, that Florence was to have the privilege of redeeming the land in case it was bought by Troutman.

The transaction with Samuel Jacobs & Co. does not seem to have been a sale to them by Troutman of the Florence land, but rather of the claim he held against Florence for the redemption of said land. The paper exhibited by them which purports to evidence a sale of the land is not signed by Troutman, and the evidence of Hoblegill, which is corroborated by all the circumstances developed by the record, not only rebuts the idea of any such sale, but, we think, establishes satisfactorily, that he (Troutman) accepted the merchandise account, and the agreement of Samuel Jacob & Co. to deliver to him the three Hardin county bonds in full satisfaction of his claim against Florence, and that he agreed that the same should be paid to them. This agreement passed to them the benefit of Troutman's lien upon the land to secure the judgment of the claim against Florence, and authorized him to make payments to them in the extinguishment of the same. Hence the lands of Florence are liable only for the balance due from him to Samuel Jacob & Co., and the court erred in adjudging them to be sold in satisfaction of the amount still

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due and owing from them to Troutman. It seems that Troutman procured a conveyance of said land under his purchase at the decretal sale, and therefore held the legal title to the same at the time of his death. His heirs should have been made parties to this action before judgment, in order that the court might be able to pass their title to the purchaser.

For the errors indicated the judgment is reversed, and the cause remanded, with instructions to the circuit court to cause the heirs of Troutman to be made parties to this action and for further proceedings consistent with this opinion.

Sweeney & S., for appellant.

Wintersmith, for appellee.

CURATORS OF KENTUCKY UNIVERSITY v. SANFORD McBRAYER, &C.

Alternative Pleading—Recovery On.

An allegation in a petition "that 'A' had subscribed and paid for, or bought, etc.," held, to be an alternative pleading, one showing no cause of action, a judgment on the petition is erroneous.

APPEAL FROM MERCER CIRCUIT COURT.

December 14, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

If the author of the brief for appellant, to which no name is signed, had turned to *section 77, Civil Code*, much time and labor might have been saved, which was wasted in discussing imaginary questions.

In the case of *McBrayer v. Allin, etc.*, it is distinctly alleged in the petition that *two hundred* and seven dollars and 23 cents is the balance of the debt due, with \$1.25 costs, and a judgment requiring appellant to pay into court \$1,220 was both unreasonable and without sanction of law.

Moreover, it is alleged in the petition alternatively, that Allen had subscribed and paid for, *or bought*, two Bacon College scholarships of \$500 each; if he had *subscribed and paid* for them, he

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being at the time a citizen of Mercer county he might, under the *act of 1865, 1 volume Sess. Acts, p. 68*, be entitled to have the money refunded to him; but the act makes no such provision as to stock or scholarships bought, and as pleadings are to be taken most strongly against the pleader, if he states his case in the alternative, and in one state of case shows he has no cause of action, a judgment on such a petition will be erroneous. The case of *Carter v. the same*, was by consent of *all parties*, as is contended by appellee, not only consolidated with the one of McBrayer, but the judgment in the first named case is to be treated as the judgment in both cases, consequently the judgment as to Carter is also before us, and as the court had no legal authority to render a judgment against appellant for \$1,220 to pay two hundred and seven dollars and 23 cents, neither had it authority to render judgment for the \$1,220 to pay a debt of less than \$100. But the quarterly court had no jurisdiction to render any such judgment.

Wherefore, the judgments against appellant, the Kentucky University are *reversed*, and the cause remanded for further proceedings consistent herewith, if upon the return of the cause appellee McBrayer's representative, and Carter should obtain leave to amend their petition, appellant should be permitted to file an answer.

Thompson & Daviess, for appellant.

Kyle, for appellee.

JOHN A. BOSTON, &C. v. R. E. LITTLE, &C.

Infants—Avoiding Deed—Estoppel.

Infants who executed a deed of conveyance before they became 21 years of age, are not estopped from avoiding same after they become of age.

APPEAL FROM MADISON CIRCUIT COURT.

November 1, 1870.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE HARDIN:

It sufficiently appears that both the appellee Mrs. Taylor and her sister Bettie Little were under 21 years of age when they acknowledged the deed to Shackelford; and no grounds of estoppel appear in this record to prevent either the surviving sister or the heirs of the deceased one from avoiding the deed as to them, much less the appellee Robert E. Little, who was not only an infant when the deed was made, but did not even attempt to unite in it. A right of recovery was, therefore, manifested in each of the appellees, both as heirs of Thomas G. Little and of said Bettie Little, but it seems to us that the judgment is radically erroneous in being made to include for each of them one-fifth of the improvements as well as the ground Thomas G. Little himself acquired his title subject to the right of Shackelford to the brick of the burned building, and whatever rights the appellee Robert E. Little might have in some contingency respecting the improvements made by the appellants and Cuzick, he not having attempted to convey, we are satisfied the claim of the appellants for improvements should have been upheld so far as those improvements were constituted by the brick originally purchased by Shackelford, and so far also as the rights of the appellee are enforceable by avoiding the acts of said Bettie Little and Mary Taylor as grantors in the conveyance to Shackelford.

Whether or not the appellants stand in an attitude, with reference to Robert E. Little's claim, respecting the improvements, other than the brick purchased by Shackelford, to entitle them to protection under section 1 of article 1 of chapter 70 of the Revised Statutes, is a question we need not now decide, as it does not appear to so divide the lot as to pay off at least one-fifth part, according to its value remaining only improved as when Shackelford purchased, and subject to his right to the brick, and leaving to the appellants all their valuable and lasting improvements, which should have been done, if practicable, according to a well settled principle of equity independent of the statute referred to.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Caperton, for appellant.

Turner, Little, for appellee.

Opinion of the Court.

ANDREW TRUMBO, &C., v. THOS. BARBER, &C.

Fraudulent Conveyance—Parent and Child—No Consideration.

A conveyance by a father to his son of a large amount of property without a visible change of possession, and at a time when the father was heavily involved, and in the absence of proof that the son had paid any of the purchase price, or was able to do, held to be fraudulent as to creditors of the father.

APPEAL FROM FLEMING CIRCUIT COURT.

February 1, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

In 1854, Lee and Grant owned jointly a farm, mills, and dwelling house, etc., on Licking river in Fleming county. Gault sold, as he proves, to Thomas Barber, Sr., his interest in said property, and Lee and Barber then made partition, Lee taking the farm, and Barber the mills, houses, etc., on the river. And on the 3rd of July, 1854, Lee conveyed the same to Thomas Barber, Sr., and Margaret, his wife, Daniel Barber, George Barber, and Thomas Barber, Jr., the three last being the sons of Thomas Barber, Sr.

In April of the same year Isaac Trumbo conveyed in consideration of \$1,000 to Thomas Barber, Sr., Daniel Barber, George Barber, Thomas Barber, Jr., and Robert A. Caldwell a mill lot containing one acre with a dwelling house and mill on the opposite side of Licking river to the property conveyed to the Barbers by Lee, and in Bath county. Subsequently Caldwell sold and conveyed his interest, being the one-half in said mill property for the consideration recited in the deed to the Barbers.

In 1859, Thomas Barber, Sr., George Barber and Thomas Barber, Jr., conveyed all their interest in one-half of the property purchased of T. Trumbo to Daniel Barber in consideration that he had sold and released to them all his interest in the mills, etc., in Fleming county. This deed bears date the 2nd of March, 1859, and on the 17th day of the same month Thomas Barber, Sr., conveyed his interest in the Fleming property, designated as one-

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fifth, to Thomas Barber, Jr., for the *recited* consideration of seven hundred dollars in hand paid. And this suit was brought on the 1st day of February, 1861, by appellants to set aside the last named conveyance, as fraudulent and to subject the property, or the interest of Thomas Barber, Sr., therein to the payment of debts, which they allege he owed them prior to said conveyance, and for which they had judgments and executions with returns of *nulla bona*.

In the petition, it is alleged that the purchase of the Fleming property was made by Thomas Barber, Sr., and the payments were made by him, that his wife had no estate, his sons were young men, two of them just over 21 years of age, and one of them had not arrived at that age when the purchase was made of Gault, that they had no means, and it is also alleged that when the last conveyance was made by T. Barber, Sr., of all his interest to his son on the 17th day of March, 1859, the recited consideration was not paid, nor any part thereof, nor has any part been paid since; that the son had not the means to pay the same, but that the conveyance was made with the fraudulent design to prevent the creditors of the father from subjecting it to the payment of their debts.

As to the original purchase from Gault, it is shown very clearly that the money and means to pay him were furnished by Thomas Barber, Sr., for Gault proves the first payment of \$400, or \$500, was made with the proceeds of a jack which the father owned, and had sold, and the other two payments were made by assigning to him two notes of \$800 each, on Jackson, which were given to Thomas Barber, Sr., for the unpaid price of a tract of land which he had sold to Jackson, and Lee and Ewing prove they got the notes from Gault.

Then as to the sale by the father to the son, certainly no money was paid when the deed was written. Pickrell, the draftsman, proves that; Dudley, the clerk, saw no money paid to the grantor, he saw young Barber with some money on that occasion, and says he paid him his fees for taking the acknowledgement and for recording the deed, but has no recollection of seeing any money paid to the grantor.

Adams, the only witness who speaks of any money having been paid at any time, says in his examination in chief: There was *some* money paid at the time spoken of in the clerk's office, but the amount I do not recollect; to whom the money was paid, he

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does not say, but at the close of his deposition he does say there was money paid by Thomas Barber, Jr., to Thomas Barber, Sr., the amount, however, he could not recollect; it was, as he says, paid in the clerk's office.

It is worthy of notice, that in a transaction of this magnitude to these parties, that no one of those present should have been called on to witness the payment of the money, out of the crowd which seems to have been there on that occasion, and that the attention of no one should have been called specially to it. The father was heavily indebted at the time this deed was made, the parties lived together; after the deed was made they continued to live as they had lived before, and no visible change had been made in their business. The son could not have been ignorant of the father's involvements and fails not only to prove that he paid the money for the property; but fails to prove that \$700 was a sum that he could conveniently raise, or that he had money at the time, or how, or where he got it—facts which if true were susceptible of proof.

And it may be mentioned as a significant fact that the father neither answers the petition, nor is called on as a witness to testify, although he might have been made competent. The recitals in the deed are not evidence against strangers to it, and the transaction is not strengthened by anything in the deed.

From all the facts and circumstances, therefore, we are constrained to the conclusion that the deed of the 17th of March, 1859, from Thomas Barber, Sr., to Thomas Barber, Jr., was made to hinder and delay the creditors of the former, and in fraud of their rights, and that the evidence is wholly insufficient to establish the payment by the grantee of the recited consideration. Wherefore, the judgment is reversed and the cause is remanded with directions to subject the interest of Thomas Barber, Sr., in the property described in the pleadings and title papers to the payment of appellant's debts, it being one-fifth and one-fourth of one-fifth which he derived by the release of Daniel Barber to himself and others in the Fleming property for their interest in the Bath property and for other proceedings not inconsistent herewith.

Lacy, for appellant.

Throop, for appellee.

Opinion of the Court.

L. STYLES, &C., v. G. W. RILEY, &C.

Lien—Interest Note—Release Of.

The giving of a note for the interest on a lien, is not a new debt, but the legal inurement of the lien debt, and an endorsed credit, nor taking of personal security without other evidence of actual acceptance as partial payment, cannot be considered as a release of the lien, *pro tanto*.

APPEAL FROM MARION CIRCUIT COURT.

October 12, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

If, as urged by Riley's counsel, Styles was not entitled to interest on the unpaid notes for his land since the declaration of Bray's bankruptcy, still, as he was charged with interest on his larger note as purchaser from the assignee without a credit for the lien notes, he was charged virtually with interest on his own money and the allowance complained of was, in effect, but a centralization of the unjust charge of interest against him.

The note for \$274 seems to have been given for interest on the lien notes for the year 1865. That incidental interest was not a new debt, but the legal inurement of the lien debt, and neither the endorsed credit nor the taking of personal security without other evidence of actual acceptance as partial payment can be considered as tantamount to a release of the lien *pro tanto*. It seems to us, therefore, that the lien still subsists for so much of the note for \$274 as was for interest. The decree disallowing the whole of the note is therefore adjudged erroneous.

But the disallowance of the \$60 note was right.

Wherefore, the judgment is reversed, and the cause remanded for a credit of the note for \$274 to the extent hereinbefore indicated.

Thomas, for appellants.

Russell & A., for appellees.

Opinion of the Court.

W. F. McNAMARA, &C., v. JAMES W. SIBLEY, &C.

Discovery—Undisclosed Payments—Continuance—Pleading.

Where an answer to a petition to foreclose a mortgage shows undisclosed payments, and a charge of usury, the defendant would be entitled to time for preparation, and an order of discovery.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 15, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The statute requires no demand or affidavit in this case, especially as there is no administrator.

But, while the pleadings and exhibits manifest a right to foreclose the mortgage, *in due time*, for whatever may be due upon it, the allegations, in the answer, of undisclosed payments and of usury to a large amount not precisely ascertained by the appellants, but known by the appellees, though vague and indefinite, were nevertheless issuable, and, rents averred by the appellees, entitled the appellants to some time for preparation either by requiring a discovery or by an inquisition before the master.

The forced submission for final decree only a few days after the filing of the answer was therefore premature and unauthorized, and the judgment for foreclosure and sale erroneous, especially as payments and reclaimable usury to some extent as alleged are not controverted by the appellees.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings by a discovery the appellants have not yet prayed for; and for otherwise litigating the question of alleged payments and usury.

Hallam, for appellants.

Benton, for appellees.

Opinion of the Court.

SCHOLL & ADAMS v. T. G. & T. C. BRONSTON

Pleading—Amended Petition and Replies—Insufficiency.

Where the original petition distinctly sets out a cause of action, it is not error for the court to refuse the filing of an amendment, and a reply which contains no available allegations other than those stated in the originals.

APPEAL FROM POWELL CIRCUIT COURT.

October 10, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

A judgment may by a proceeding in equity be avoided for fraud unquestionably. In this case the answers of defendants were filed in August, 1870, denying all fraud and mistake in rendering, and entering the judgment, or in its procurement, and the cause appears to have been heard in March, 1871, without objection on the part of appellants. The denials in the answers are most elaborate and full, and there was no proof taken to sustain the allegations of fraud, or mistake, and consequently the court below could do nothing less than dissolve the injunction, and dismiss the petitions.

The only available grounds for relief were that the judgment was procured by fraud or mistake, those charges were distinctly and sufficiently made in the original petitions. The amended petitions and replies as they are called contained no available allegations other than these stated in the originals, and no error was committed by the court in refusing to permit them to be filed.

Judgment affirmed.

J. H. Scholl, for appellant.

Turner, for appellee.

Opinion of the Court.

THOS. J. PREWITT v. H. McELROY.

Jurisdiction—Circuit, Quarterly Courts—Amount in Controversy.

In an action for \$50.00 actual damages, and \$50.00 punitive damages, the amount as a whole is sufficient to give the Circuit Court original jurisdiction, under secs. 18, 24 and 29, Civ. Code.

APPEAL FROM MARION CIRCUIT COURT.

October 8, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

As it may be some consolation to attorneys and client who feel so great solicitude to have the law correctly settled, and so little interest in the amount in controversy, this court is disposed on that account to extend the opinion.

It is said in the petition for a re-hearing in the opinion of attorneys that by the opinion delivered in this case this court has settled the doctrine that a plaintiff may sue for fifty dollars in the circuit court.

While plaintiff below alleges in his petition that the actual damages sustained by him for the wounding and killing of his hogs by defendant was fifty dollars still he claims for punitive damages in his petition fifty dollars more making in all *one hundred dollars claimed in damages*. Can it be said then and will counsel contend when a party claims damages to the amount of one hundred dollars, that that sum is not the amount in controversy? How is the matter (as to amount) in controversy to be determined otherwise than by the amount for which judgment is asked?

Reference is made to by the attorneys to *sections 24 and 29 Code*. The first of which provides that "The quarterly courts have jurisdiction of all actions for the recovery of money, or personal property where the matter in controversy, exclusive of interest and cost does not exceed one hundred dollars in value; and of inquests upon idiots and lunatics; and of all other actions and proceedings of which justices of the peace have jurisdiction." Sec. 29 provides "The courts of justices of the peace shall have jurisdiction *exclusive* of the Circuit Court; but concurrent with

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the quarterly court of all actions, and proceedings for the recovery of money, or personal property where the matter in controversy, exclusive of interest and cost, does not exceed fifty dollars in value; and in other cases specially provided for by Statute."

By Sec. 18 Civil Code. Circuit Courts have original jurisdiction over all actions, and proceedings for the enforcements of civil rights, or redress of civil wrongs except where *exclusive* jurisdiction is given to other courts.

The jurisdiction given to quarterly courts by *Sec. 24 Supra* for the recovery of money, or personal property where the matter in controversy exclusive of interest and cost does not exceed one hundred dollars in value is not *exclusive* of, but is merely concurrent with the Circuit Court and as the amount demanded in the petition is the amount in controversy, it must result that the circuit court had jurisdiction, since one hundred dollars are demanded in the petition.

As the jury had found the damages sustained by appellee and by section 3, article 1 of chapter 50, R. S., he was entitled to double damages; the court below had the legal authority to render judgment accordingly.

Wherefore the judgment must be *affirmed*.

Russell & Avrit, for appellant.

Lisle, for appellee.

M. W. LYONS, &C. v. JAMES CASSIDY.

Co-Tenancy—Use and Occupation—Estoppel to Claim Rent.

Where, by the terms of a deed, a house was divided equally between the claimants at the time the deed was given to use by two families, a subsequent action cannot be maintained to recover for use of a portion of the house which was vacant at the date of the deed.

APPEAL FROM FLEMING CIRCUIT COURT.

October 25, 1870.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

On the 1st of January, 1865, appellants conveyed a part of a lot they then owned in Flemingsburg to appellee—reciting in the deed that the house upon the lot is not deeded away, but is to be kept in repair by the parties to the deed, and when taken down as it is a very old house, the materials are to be equally divided between them; more than one-half of said house stands on the ground conveyed, “and the parties wishing to use the house in common, while it stands, each party is to use the house as it is now used by the parties, it being divided as near equally as it can be, each party is to repair the said house so that two families can live in said house, part of the house being still on the lot not conveyed by this deed.”

This action was originally brought to recover rent for the east room up stairs of the house referred to in said deed. Upon the allegation that the upstairs not being at the time of the division occupied no division of the upper story was made, that there are three upper rooms, two of which have been from the 21th of March, 1865, occupied by appellee and his tenant, while appellants have occupied but one and therefore, are entitled to recover \$1.50 per month for the use and occupation of said room.

An amended petition was filed containing two paragraphs, the first one of which somewhat obscured by frequent references to, and quotations from the deed, and repetitions concludes by again asserting claim to compensation for the rent of the east room, the allegations therein being substantially the same as those of the original petition.

The second paragraph contains allegations that the house is old, dilapidated and unfit for habitation, and that it is not only dangerous to the occupants but to passers by, and concludes with a prayer that the court should order it to be taken down and the materials divided. It is also alleged that it is in such a state of dilapidation that it can not be repaired.

The allegations are all traversed by the answer, and the relief sought resisted.

The petition was dismissed on final hearing, and the plaintiffs below have appealed.

It appears from the deed that the parties themselves had then divided the house as nearly equal as it could be, by which recital appellants are estopped, unless there was fraud, or mistake in

Opinion of the Court.

the deed in reference thereto, neither of which is charged in the petition, and the claim for rent consequently could not be sustained.

The parties certainly, from the language of the deed, contemplated that it would be necessary to take the house down at some future period; but that is inferential, there is no positive stipulation in the deed that it shall be done at any particular time, and as to the necessity of doing it when the suit was instituted, although one witness is of opinion it would be prudent to repair it, still all concur that it is in a dilapidated, and unsafe condition and a majority of them express the opinion that it would be unprofitable, and a waste of means to attempt to repair it, and that the house is liable to fall, that the foundation has given away and that it is perhaps kept up by a frame at one end.

Under these circumstances the court below should have ordered the house to be taken down at the joint cost of the owners after giving the tenants reasonable time to secure residences elsewhere. The exceptions to Mrs. Joyce's deposition should have been sustained.

Wherefore the judgment is reversed and the cause is remanded with directions to enter judgment and for further proceedings consistent herewith.

Cord, for appellants.

Andrews, for appellee.

G. W. LUCKETT, & CO. v. CHAS. BEAVON, & CO.

Bonds—Supplying New Bond, for Former One Burnt—Court's Discretion.

When the burnt record of a will and the probate thereof, is supplied in the county court by oral testimony, the same court has jurisdiction either to supply, in the same way, the executorial bond, executed at the time of the probate, or take a new bond, with the same or other sureties.

Same—Principal and Surety.

The new bond thus taken, binds its sureties, to pay all legacies; and it is therefore immaterial whether the amount of the legacy was collected since or before the date of the new bond.

Opinion of the Court.

Principal and Surety—Contribution From Old Sureties—Parties.

To entitle the sureties in a new bond, to contribution from the sureties in the former bond, they must be brought before the court, in the action in which they are defendants. It is not the duty of the plaintiff in the action to do this for them.

APPEAL FROM MARION CIRCUIT COURT.

October 11, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

When the burnt record of the will and probate was supplied in the county court by oral testimony, the same court had jurisdiction either to supply, in the same way, the executorial bond executed at the time of probate, or to take a new bond with the same or other securities. The court chose to take a new bond in *lieu* of the original. If this discharged the original sureties from all liability, the sureties in the substantial bond are liable from the date of the burnt bond. But however this may be, the new bond expressly binds its sureties to pay all legacies, including that to the lunatic for life, and afterwards to others; and therefore it is immaterial to this liability whether the amount of that legacy was collected since or before the date of the new bond.

Nor is it in this case material whether the new bond was in legal effect a discharge of the sureties on the burnt bond, or only a supplemental obligation. If merely supplemental, the sureties in it may be entitled to contribution by those in the first bond; but the appellants have not either shown who were the first parties, or requested them to be made parties, or asked any judgment against them. And it was not the duty of the appellee to do this for them.

We also think, and especially as the will so directed, that the circuit court properly ordered the \$1,000.00 to be paid to the committee of the lunatic.

We perceive no substantial error in the record.

Wherefore, the judgment is affirmed.

Russell, Averitt, for appellants.

R. & F., for appellees.

Opinion of the Court.

JOHN MCDANIEL v. WM. MATTINGLY.

Partnership—Action On—When to Accrue.

M. abandoned a farm, the estate being left in the hands of McD., the other partner: Held that as the possession of McD. was not unfriendly to M. no cause of action could accrue in favor of M. until the character of this holding was changed.

APPEAL FROM MC LEAN CIRCUIT COURT.

October 29, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

After a careful analysis of the evidence we are satisfied that it sustains the report of the Master Commissioner. We also hold that it was proper to refer the accounts between the parties to him for settlement.

It is not necessary to determine whether or not the partnership existing between the parties was terminated on the 11th of November, 1861, by the involuntary abandonment by Mattingly of appellant's farm. If it was, still as the partnership assets were left in the hands of McDaniel, whose possession was certainly not unfriendly to Mattingly no cause of action could possibly have occurred in favor of the latter until the character of this holding was changed. So long as it continued McDaniel must be regarded as holding the partnership property, as well for his absent partner as for himself.

There is no evidence that he converted the same or did any act that could be made to bear the construction of being unfriendly to McDaniel, at any time anterior to the beginning of the five years next preceding the institution of this suit. Hence the plea of limitation was properly disregarded. Judgment affirmed.

Owens, for appellant.

Opinion of the Court.

D. S. MILLS v. DAVID COLE.

New Trial—Submission to Jury.

It is error for the court to grant a new trial, where the case was submitted to the jury on the evidence, with instructions asked for by both litigants to which no exceptions were taken, and the jury found in accordance therewith.

Same—Jury.

On a conflicting deposition given by a witness, in two different trials, it is within the power of the jury to conclude that witness was mistaken in one.

APPEAL FROM JEFFERSON COURT OF COMMON PLEAS.

October 8, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

This case has been twice tried in the court below. On the first the issue on the plea of *non est factum* was submitted to a jury with the instructions asked by each party without objection, and to which no exceptions were taken. And a verdict and judgment having been rendered for defendant, on motion of appellee a new trial was awarded, on the ground that the verdict was against the evidence. On the second trial the law and facts were by agreement of the parties submitted to the court, who rendered judgment for appellee and appellant has appealed to this court.

The granting of the new trial is the first error complained of. On that trial the note with the testimony of the witnesses was before the jury, and was a part of the evidence—and whatever suspicions of the genuineness of the note, might arise on its face from apparent erasures of one word or more, and the insertion of others, and the similarity of the signature of Mills to the manuscript in the body of the note they had a right to consider with the other evidence, they were facts legitimately before them for their consideration.

O'Bannon's deposition it appears had been twice taken before the first trial and both his depositions were read to the jury. In the first he said *I believe* the signature of Mills to the note was

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put there by W. A. Jenkins and when asked on cross examination the following question "*Was not the name of Mills placed upon that note long after the first signature was put on it?*" He replied "*he did not know.*". In the second one—he stated in reply to the first interrogatory therein that he was in the employ of W. A. Jenkins, and received forty-four tons of hay from David Cole and reported the amount to W. A. Jenkins and he, Jenkins, *filled up a note*, and signed his name and the name of D. S. Mills to the same, and delivered the same to David Cole in his presence.

This certainly is a very different statement from that made in his first deposition—and while Henry Jenkins swears in answer to a question confined to the signature alone that *he believed the signature* of Mills to the note is in the handwriting of W. A. Jenkins, he does not say the filling up of the note is nor a word on that subject—and from an inspection of the original note which is before us, and a comparison of the name of W. A. Jenkins to it, with the filling up thereof, the jury were authorized to conclude that the witness was mistaken.

The question is not whether Jenkins could not have bound himself and partner for a firm debt by the signature of his name alone to the note—but has the note since it was made and delivered been so changed in a material part as to destroy its obligatory force in law? That question was submitted to a jury on the pleadings—and we are constrained to the conclusion that their finding on that issue was not contrary to the evidence or so much against the weight of the evidence as to authorize the court to grant a new trial.

Wherefore the judgment is *reversed* and the cause is remanded with directions to set aside the last judgment and render judgment on the verdict of the jury for appellant.

Gibson, for appellant.

Speed, for appellee.

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WM. McGOWAN, &C. v. WM. BURTON.

Husband and Wife—Sale of Property—Vendor and Purchaser.

A husband cannot divest his wife of her interest in lands, by transferring a note given her for the purchase price thereof, in exchange for another note, the latter of which became worthless by reason of the bankruptcy of the maker of the last note.

Same.

The husband cannot, without the consent of his wife, evidenced as prescribed by law, pass her title to realty, nor destroy her right of retainer she holds upon the legal title to her land, to secure the payment of the purchase price.

APPEAL FROM HENRY CIRCUIT COURT.

October 8, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

Sallie E. Burton, now McGowan, was the owner of one-third of a tract of land containing about 112 acres situated in Henry county. In the year 1865, she (being then unmarried) sold her interest in said lands to her uncle, William Burton, for five hundred and sixty dollars, to be due and payable on the 1st of March, 1866. She shortly afterwards intermarried with appellant, William McGowan, who was an infant and who did not attain his majority until the 27th of March, 1867.

Some time during the year 1866, Wm. Burton induced McGowan, who was still an infant, to surrender to him the notes he had executed to his wife for the purchase price of her land, and to accept in lieu of a balance due thereon, the joint note of his son, G. W. Burton, and one Adams, who were partners in the mercantile business.

On the 28th day of March, 1867, the day after McGowan became of age, Burton and Adams induced him to surrender to them the joint note given by them, and in lieu of the same executed to him a new note due one day after date for the sum of \$177.65. Shortly after the execution of the note, Burton and Adams became insolvent and William Burton filed his petition in bankruptcy.

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On the 27th of July, 1867, Sallie E. McGowan and her husband brought suit in the Henry Circuit Court setting up these facts, and asking that the land sold to William Burton be subjected to the payment of the balance due on the same as evidenced by the note of Burton and Adams, at the same time rendering to said William Burton their deed of conveyance to the land. Upon the trial of this action the court dismissed their petition and adjudged a conveyance of the land to Burton, and from that judgment they appeal.

Whether the sale to William Burton was in writing or parol, the legal title to the land remained in Mrs. McGowan, and she could only be compelled to convey when it was shown that she had received the full amount of the purchase money as agreed upon by her. Her husband, it is true, could collect or dispose of her choses in action, but he could not without her consent evidenced as prescribed by law, pass her title to realty, nor destroy the right of retainer she held upon the legal title to her land to secure the payment of the purchase price.

It is clear that the note of Burton and Adams for \$177.65 is for a balance due her on the sale of her land. It has not been paid, and the Circuit Court should have subjected the land to the payment of the same, before decreeing a conveyance to William Burton. The judgment is reversed and the cause remanded for further proceedings consistent herewith.

Pryor, for appellants.

B. LEIBER v. GEO. J. BECK.

Principal and Agent—Authority of Agent to Bind Principal—Special Agent.

An agent can bind his principal on a note by filling in blanks, after the note had been sent him, though the name filled in was not the person to whom the principal intended the note made payable.

Same—Special Agent—Plea of Non Est Factum.

A plea of non est factum to a note, the blanks of which had been filled in by the agent of the payors, can only be sustained when the person so acting, was a special agent so far as the particular note was concerned, and that his authority was limited to fill in a particular name.

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APPEAL FROM LOUISVILLE CHANCERY COURT.

October 20, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

The plea of *non est factum* can only be sustained upon the hypothesis that Griff was a special agent so far as the particular note in question is concerned, and that he had no authority from and Lieber to fill up the blanks in favor of any one else than Nelson. We have not the original paper before us, but the pleadings and evidence in the case warrant us in concluding that the name of the payee as well as the date and amount were left blank when the note was sent to Griff, and this circumstance certainly indicates that the possibility of its being filled up in favor of some other party than Nelson, was contemplated by the payors. This presumption is strengthened by the evidence of Griff who says that he had authority to use it in paying Nelson, 'or in raising funds for the necessary expenses, in removing the mill.'

But Griff expressly contradicts the idea that he was a special agent, and states that he had the same power with any other agent. That he felt he had the right to fill up the note and deliver it to Beck because he was acting as the agent and attorney of the parties. He seemed to understand that he had the right to do all necessary acts connected with the business of removing the mill to Kentucky including the settlement of the claims against it. It is true that he does not state as explicitly as he might the scope and extent of his authority but it should be borne in mind that he was not only the witness of the appellant, but his trusted agent and kinsman.

We are of opinion from all the evidence in the case that he had authority to fill up and deliver the note to Beck. We also conclude that said note was executed upon a sufficient legal consideration.

It seems to us that Mrs. Lieber by the use of reasonable diligence could have discovered before the trial what could be proven by Mrs. Griff. She charges in her answer that the note was executed by Griff 'for individual debt of his wife.' Yet she failed to examine Griff upon this point when she had his deposition taken, and failed altogether it seems to even inquire of

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Mrs. Griff relative thereto, although it appears that they both resided in the city of Louisville during the entire time this suit was pending.

We are of opinion that the chancellor committed no error prejudicial to the substantial rights of appellant and we affirm his judgment.

Pirtle, Dombitz & Wehle, for appellant.

Bodley & Simrall, for appellee.

T. C. BLACKWELL v. R. L. BYRNE.

Set-off and Counter-claim—Action On—Claim for Damages—Contracts of Builders.

Though a plaintiff may, under Civil Code, sections 38 and 126, sue defendants jointly or severally, a claim for damages presented by a counter-claim, for defective work, is not a right of action in either of them separately, but jointly.

Same—Parties—Demurrer.

The counter-claim as pleaded by one defendant alone, was not maintainable, it not being a complete cause of action in favor of the party pleading it, and the demurrer should have been sustained.

APPEAL FROM UNION CIRCUIT COURT.

October 28, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

This action was brought by the appellant against R. L. Byrne for the recovery of \$112.37 as a balance of a joint demand against him and T. S. Chapman upon a contract for building a house, which as alleged had been ascertained by a parol arbitration and award. The defendant by his answer pleaded a counter-claim, on which he sought a recovery over against the plaintiff, without making Chapman a party, for damages sustained by them, in consequence of a defective performance of the contract to build the house, in certain particulars, which he alleged, were by the plaintiff, fraudulently concealed from the defendant and the arbitrators, and therefore not considered by the latter.

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The answer and counter-claim were adjudged sufficient on demurrer, and a trial of the case resulted in a verdict and judgment for the defendant for \$200, from which the court having refused to grant a new trial, this appeal is prosecuted. Although, under section 38 of the Civil Code of Practice, the plaintiff might at his option have sued either Byrne or Chapman separately, or both of them jointly, upon his joint demand against them, as the claim for damages presented by the counter-claim, was not a right of action in either of them separately, but jointly in them both, the counter-claim as pleaded by the appellee alone, without bringing Chapman before the court, was not maintainable, because it was not a complete cause of action in favor of the party pleading it; (Civil Code, Sec. 126); and for that reason the demurrer of the plaintiff should have been sustained.

The court also erred in permitting the defendant to examine Chapman as a witness in his behalf. If Chapman had in fact been released from responsibility to the plaintiff, as implied by his statement upon his *voir dire*, he was still certainly interested in the claim for damages asserted by the counter-claim against the plaintiff.

Wherefore the judgment is reversed and the cause remanded for a new trial and proceedings conformible to this opinion.

Bush, for appellant.

James, for appellee.

JOHN McDOWELL'S EXR. v. WOODFORD McDOWELL.**Guardian and Ward—Settlement by Guardian—No Report Filed.**

Though a statutory guardian does not make his settlement with the court as required by law, a circumstance of a settlement with his ward, who is his son, during a number of years, in which the ward claimed nothing against his guardian after becoming of age, will be upheld.

APPEAL FROM BULLITT CIRCUIT COURT.

October 12, 1870.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

Many years ago appellee was by the proper court appointed statutory guardian for his two minor sons, who inherited ninety-five acres of land, a slave, or the price for which he was sold, \$541 and \$86, their distributable part of the personalty, from their maternal grandfather.

One of them died in 1863, after he had arrived at twenty-one years of age, unmarried and intestate, the other lived until 1868, and in the month of April of the 1st named year, died testate, and appointed his widow his executrix, who brought this suit against appellee for a settlement of his accounts as guardian of her late husband, and for judgment against him for the amount in his hands which she claims to be large.

The court below dismissed her petition, and she has appealed.

It is not claimed by appellee, that he ever settled his accounts as guardian with the legal authorities to make such settlements; but he claims that he settled with his sons after their arrival at twenty-one years of age, and paid them all their estate that came to his hands.

From the exhibits filed it appears that appellee was appointed guardian as early as 1844, and the greater part of his ward's estate came to his hands in 1846; and while he does not rely on time as a bar, and produce no evidence of a formal settlement with appellant's testator, he proves that up to a short time before his death, he lived with his father except a period of some two or three years, when he was in the army, that they lived on the most friendly relations, that the father was a man of means, altogether sufficient to have settled the demands of testator at any time; and that he frequently supplied his son with money, two witnesses proving specific sums of money they knew the father advanced at different times, and his farm was used by testator to graze his stock at his pleasure, and by others it is proved that he acknowledged he was indebted to his father.

Besides as late as November, 1867, the testator executed a note to his father, acknowledging an indebtedness to him then of one hundred dollars; and after the execution of the note, A. H. Field was present on the 21st of March, 1863 when they cancelled a contract for the lease of a farm made by appellee to the testator—and the former buying the corn, farming utensils of the latter on the place, and estimating the labor he had done

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preparatory to making the crop, when appellee fell several hundred dollars in debt for the articles purchased, and labor done on the farm and assumed to pay certain specific debts of testator—this only a few days before the death of testator—and it would be strange indeed if he then considered his father indebted to him as his former guardian that he forebore to mention it, and to ask for a settlement of the claim also.

The foregoing facts and circumstances with the time which had elapsed from the period when testator arrived at age until his death which was eleven or twelve years, established very strong evidence of a settlement by the parties of the claim asserted in this suit, which is not repelled by other evidence.

Wherefore the judgment is *affirmed* on the original and cross appeals.

R. H. Field, for appellant.

A. H. Field, for appellee.

MARTHA A. MARSHALL v. J. J. ROACH.**Husband and Wife.**

Separate estate of wife, not liable for debts of her husband. 2 Bush 413. Second judgment reversed.

Same—Sales—Personal Property.

Where a transfer of bank stock made before creation of debts of husband, though final payment of all purchase money not made until after such debts, the sale will not be set aside as fraudulent.

APPEAL FROM TAYLOR CIRCUIT COURT.

October 13, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The tract of land conveyed by Penick and wife to appellant, M. A. Marshall, as was adjudged by this court in *Marshall, &c. vs. Marshall & Penick*, 2 Bush 413 was the property of Mrs. Marshall, and not liable to her husband's debts, and which by the judgment in this case now complained of was ordered to be

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sold to pay appellee's demands, that judgment for the reasons stated in the case referred to is erroneous.

As to the bank stock—Barrett proves it was purchased and the transfers were made in the spring of 1859, which was prior to the creation of all the debts sought to be recovered by appellee except the one for \$124.65, and that as appears by the credits entered was nearly all paid, not five dollars of it was unpaid when this suit was brought—even then if there was no other objection to the judgment—appellee having become the creditor of the husband after the transfer of the stock to the wife, has not established his right to set aside said transfer and subject said stock to the payment of his demands—and the court below erred in so adjudging.

Wherefore the judgment is *reversed* and the cause is remanded with directions to dismiss appellee's petition as to appellant, Martha A. Marshall, and for further proceedings consistent herewith.

James & Lindsey, for appellant.

Bodman, for appellee.

WEST & BRO. v. J. DOWLING & BRO.

Damages, Measure of—Warranty, Covenant of.

Appellees bought whisky barrels, which they knew were leaky; this leakage continued, without effort by them to stop same, they relying on their general warranty as to the perfect condition of the barrels: Held that the criterion of damages only was the difference between the barrels furnished and those contracted for.

Depositions—Evidence—Affidavit to Suppress.

A motion was made to suppress a deposition and in support of same, an affidavit was made by the attorney that he was present when the deposition was given, that on the conclusion of examination for appellee, the witness refused to be cross-examined, and were encouraged in this refusal by counsel for appellees. Held, in the absence of any conflicting proof as to the taking of the deposition, it was error for the court to refuse the affidavit to be read as evidence, and not to suppress the deposition.

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APPEAL FROM FAYETTE CIRCUIT COURT.

September 30, 1871.

OPINION OF THE COURT BY JUDGE PRYOR.

We perceive no error prejudicial to the appellants in the instructions given, as to the criterion of damages for the alleged violation of the contract as set forth in appellants' counter-claim. Many authorities have been referred to by counsel for appellant and some of them tending to sustain the legal position assumed. There are many cases to be found in the books where the measure of damages is established, but the rule is made to change, by the facts proven in each particular case. The case referred to in Sedgwick on Damages, page 86, where the action was brought in the English Common Pleas on the warranty of a chain cable, "that it would last two years as a substitute for a rope cable" and it was alleged that within the two years the cable broke, and thereby an anchor attached to it was lost, the court held that the warrantor was liable on his warranty for the value of the anchor. *Bonodaile vs. Bronston, 8 Stanton*. Another case cited is where one made a rope for another knowing that it was to be used in raising and lowering casks, and a cask of wine was spilled by reason of the rope breaking, it was held that a recovery might be had, for the cask of wine. These are extreme cases and no adjudication can be found in this State going so far in determining the question of damages, and Sedgwick in a note referring to the decision of the English court in regard to the cable, remarks "that the case is badly reported or the Commonwealth's chief parties gave the warranty a very broad construction." There is a material distinction however between the case at bar and the cases above referred to. The damages in each one of those cases was sudden and complete and no effort upon the part of the owner of the wire or cable could have prevented the loss, and in the case we are now considering the appellees knew the moment the whiskey was placed in the barrels, that it was leaking out; this leakage continued for weeks, and they stood quietly by, and permitted the whiskey to escape from the barrels, when it was in their power to have prevented it—this they failed, or refused to do, relying, as they allege upon their warranty. We concur with the court below, that the criterion of damages in this case

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is the difference between the barrels furnished, and those contracted for. On the trial of the case in the court below the appellants filed exceptions to the depositions of John Finn and Hugh Stafford and moved the court to suppress their depositions. They offered to read in support of the motion the affidavit of D. W. Armstrong an attorney stating that as attorney for appellants he was present at 9 o'clock a. m. of the day on which these depositions were taken and the examiner having concluded the examination of the witnesses for the appellees the witnesses refused to be cross-examined, and were encouraged in this refusal by counsel for appellees. The appellees objected to the reading of this affidavit and the objection was sustained, and the depositions read to the jury. "An affidavit is a written declaration under oath made without notice to the adverse party." Sec. 608 of the Civil Code, provides "that an affidavit may be read upon a motion, and in any other case provided by law." The court erred in refusing to permit the affidavit of Armstrong to be read and with this affidavit before the court and in the absence of any conflicting proof in regard to the taking of these depositions, they should have been suppressed. This testimony was material to the issue involved and no doubt affected the verdict of the jury, for this error the judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Kinkead & Darnall, for appellants.

Huston & Mulligan, for appellees.

ELIZABETH SUTHERLAND, &C. v. WASHINGTON THOMAS.**Vendor and Purchaser—Rescission—Rents and Profits.**

After a conveyance had been ordered cancelled by the court, by reason of undue influence in the procurement thereof, the original vendor voluntarily surrendered the use of the land to the vendee during the time of the litigation: Held, that he must be considered as acquiescing in the transaction, and cannot be allowed to claim rents, up to the time of bringing the action to rescind the deed.

APPEAL FROM SPENCER CIRCUIT COURT.

September 19, 1871.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

A careful examination of the testimony in this case leaves no doubt upon our minds that appellee executed to Mrs. Sutherland his bond agreeing to convey her one hundred and fifty acres of land for the mere purpose of securing her on account of the amount she had advanced in the redemption of the land from the execution purchase. We are also of opinion that appellee was induced to execute the deed to the eighty-nine acres in controversy, under which Mrs. Sutherland now claims title, through the influence of N. G. Thomas who was at the time acting as the agent of appellant. Appellee seems to be a weak, irresolute and feeble-minded man, able to transact ordinary business, but wholly incapable of resisting the influence and persuasions of persons of superior mind.

He was greatly embarrassed, was being pressed by an impertinent creditor, and had succeeded in negotiating with Russell a favorable sale which, under the circumstances, it was important to him should be consummated. A portion of the land sold to Russell was embraced in the trust described in his title bond to Mrs. Sutherland. This incumbrance it was necessary that he should remove, in order to perfect the title he was about to convey to the purchaser. In his attempt to do this he came in contact with N. G. Thomas, agent for appellant, a man of superior sagacity and of great determination, and the result was that appellee was induced to make the conveyance to Mrs. Sutherland against his protestations and whilst he was resisting that the deed was being extorted in violation of the agreement originally made with her when his land was redeemed.

By this deed, Mrs. Sutherland obtained title to twenty-four acres more than she had ever claimed. The land conveyed was worth more than double the amount she had advanced for appellee, and under the circumstances it would be unconscientious to permit her to retain such an advantage. The circuit court properly cancelled the conveyance. But we are of opinion said court erred in the adoption of the basis upon which the claim for rents and interest were adjusted.

After the execution of the deed, and when it may be assumed that appellee had so far extricated himself from his financial difficulties as to become a free agent, he voluntarily surrendered the premises to his vendee, and for several years without question

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so far as appears from the record permitted her to hold and enjoy them as her own.

During this period he must be regarded as acquiescing in the transaction, and cannot be allowed to claim rents. The interest on the purchase money must be set off against the rents.

This rule however does not hold good after the service of process in this suit. From that day forward Mrs. Sutherland held, with full notice of appellee's repudiation of the deed under which she claimed.

And from that date she should be charged with rents, and allowed interest on the amount of the consideration set out in the deed. And for the security of such balance of this consideration with accrued interest as may remain unsatisfied after deducting rents she holds a lien upon the land.

For the correction of the error indicated the judgment is reversed and the cause remanded.

Bullock & Davis, for appellant.

Rodman, Harcourt, for appellee.

WM. TIBB'S ADMR. v. JAS. S. PAUL'S ADMR., &C.

Partnership—Purchase of Property—Use and Occupation.

A. and B. made a purchase of a parcel of land, one day before a partnership was formed, and the purchase price went in as part of their subscription to the partnership. No deed of transfer was made to the firm. The partnership company exercised control over and erected a mill on the property. The original purchasers made one or two attempts to sell the property as individuals. Held, that in a contest over the sale of the property at a loss, it should be borne by the firm, and not by the individuals.

APPEAL FROM HENDERSON CIRCUIT COURT.

December 8, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The report of the master commissioner, which was the basis of the final judgment in this case for settling the partnership

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of Paul Dunning & Co. seems not to have been excepted to, and moreover to have been right in its details and results, if the previous order of reference was correct; and the principal question as to that order is whether the court properly adjudged that the lot purchased of Priest was bought and held by the firm as partnership property, so that the loss resulting from that purchase and the subsequent sale of the lot, should be borne by all the partners or only by Paul and Dunning who alone made the contract with Priest. It appears this purchase was made the day before the partnership agreement was executed, Paul paying part of the price, as so much of his contribution of capital stock and he and Dunning giving their note for the residue and taking Priest's bond for a conveyance to the firm of Paul-Dunning & Co. and it also appears that Paul afterwards paid the note to Priest, and in some conversations afterwards expressed to exclude Tibbs from that transaction, but the firm used the lot for erecting their machinery upon it for carrying on their partnership business, and acquiesced in the appropriation of Paul's capital stock in making the first payment to Priest for the lot as a firm account; and in May 1861 the firm mortgaged the lot to McClelland to secure a partnership debt, and it is admitted that the intention of Paul and Dunning in buying the lot was to obtain a site for erecting their shingle manufacturing establishment for the use of the firm; and though Paul at one time attempted to exchange the lot with Priest for other property, that arrangement was not carried out; and we are of the opinion the court rightly held that the lot belonged to the firm and so ordered it to be sold and its proceeds divided as the other firm assets, and allowed Paul credit by the sum paid by him in discharge of the note to Priest. The residue of the order of reference seems also to have been right.

Wherefore, no available error in the judgment appearing the same is affirmed.

Turner, for appellant.

Yeaman, for appellee.

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SQUIRE LOWRY v. GEO. H. W. YOUNG.

**Execution—Sales Under—Void When More Property Sold Than Necessary—
Amount of Execution for \$600.00—Sale for More Than \$800.00**

The fact that the defendant in the execution was present and orally consented to the sale did not import to it legal validity, nor authorize the sheriff to convey to the purchaser.

APPEAL FROM MADISON CIRCUIT COURT.

December 20, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

The execution under which the land of the appellant Lowry was sold, amounted, interest and costs included, to about six hundred and fifty dollars.

Said land was sold for something over two hundred dollars more than that amount. There can be no doubt but this excess was so great as to render the action of the sheriff, so far as it depended upon the authority conferred upon him by the execution in his hands, absolutely void.

The fact that the defendant in the execution was present and orally assented to the sale, did not import it to legal vitality, nor authorize the sheriff acting in his official capacity to convey the land sold, to the purchaser. The most that the appellee Young can claim is that he is the purchaser of Lowry's land by a verbal contract. The action of *Scott vs. Lowry*, was in no sense a judicial contest between the last named parties, and the judgment of the court in that case did not have the effect of a judicial determination of their respective rights growing out of the execution sale before mentioned.

We do not think the action of the Madison Circuit Court in refusing, (upon the motion of Lowry) to set aside said sale, precludes him from making defense to this proceeding.

The sale still stands and Young is still entitled to all rights and legal advantages growing out of the same, and nothing more. And for this reason we are of opinion the circuit court erred in sustaining exceptions to all the depositions taken by Lowry to be read as evidence in his favor upon the trial of this action.

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The evidence thus excluded, establishes very satisfactorily that Young resorted to improper and fraudulent means to prevent competition in the bidding at the execution sale, and also in procuring Lowry's land to be appraised at but little more than half its real value. The most favorable attitude that he can claim to occupy is that of a purchaser from Lowry by verbal contract; and as Lowry relies upon the statute of frauds and refuses to complete the sale, he can recover only, the amount of his bid, with interest from the date of the same and his costs, and to secure the judgment of this amount he holds a lien upon Lowry's land.

There is no satisfactory proof that Lowry ever became the tenant of Young, but we do not see how this fact, if satisfactorily proven, could have the effect of stopping him from relying upon the defense he makes to this action. There having been no change of possession, the adjustment of rents and interest, does not embarrass the settlement of this controversy.

The judgment of the circuit court is reversed and the cause remanded with instructions to render a judgment in conformity with the principles indicated in this opinion.

Scott, Turner, for appellant.

Burnam, for appellee.

JNO. P. THOMAS v. PHIL T. WATKINS.**Trusts—Implied—Creation of by Act of Holder.**

An implied trust, of funds coming into a persons hands, may be made, by his acts in using the funds on his own volition, to improve property of his wards.

APPEAL FROM DAVIESS CIRCUIT COURT.

June 12, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

Neither party complains of the judgment in so far as it determines the amount to which the appellant is entitled as a

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credit on account of money advanced by him for his wards in the purchase of the improvements made upon their land by Hathaway and others. The amount to which said appellant may be entitled on account of boarding, clothing and tuition of his said wards, and on various other claims being yet undetermined by the lower court, cannot be considered upon this appeal, and the only question before this court for revision is the judgment of the circuit court charging appellant with \$4,000.00, the amount of the notes surrendered to him by the husband of his deceased sister, Mrs. Craig, in compliance with her wishes, as expressed before her death. By his answer appellant in response to the direct charge that the notes were surrendered to him to be held in trust for the use and benefit of his wards denies the specific charge as made, and says that the defendants (meaning appellees) had no interest in said notes further than he might choose to use the same, directly or indirectly, for their benefit. He admits that he did swear in his deposition that the houses purchased from Hathaway and others for the appellees were paid for with their means, and his pleadings clearly show that at that time, they had no available means whatever, unless the notes received from Mrs. Craig were held for their benefit. And in his letter of April 8, 1865, to appellee Phil T. Watkins he states that he purchased the houses from Hathaway and others with the 33½ acres of land given to him by Mrs. Craig during her life time for *that purpose*, or in other words for any purpose in aiding him in taking care of said appellee and his sisters.

The facts thus admitted, whilst they may not have created an enforceable trust in favor of the appellees, yet imposed upon the appellant a moral obligation to expend the amount of said notes for their benefit, and as he discharged this obligation by the purchase of the improvements situate upon their lands, and by so doing invested them with the legal title to the proceeds of said notes, he has made an election in their favor, and by adding to their equity, which was at least equal to his own, the legal title, to the property acquired by the fund, which in morals if not in law, be held in trust for them, he cannot now be allowed to avoid this election, voluntarily made upon a sufficient consideration, and claim against them. We are of opinion that the judg-

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ment of the circuit court upon this branch of the case is right and proper and the same is therefore affirmed.

Thompson, Weir, for appellant.

Sweeney & S., for appellee.

FRANCIS M. TAYLOR v. SALLIE CRAWDUS.

Dower—Right of—Husband and Wife.

Where the wife has given a relinquishment of her right of dower, though the commissoiner, when selling the land, proclaimed that the wife had a potential right of dower in it, this would not have the effect of restoring her right.

APPEAL FROM MARION CIRCUIT COURT.

June 21, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The principal question in this case was settled in that of *Cantrill vs. Riske*, 7 Bush, 160, in which the wife of a grantor was held to be bound by her relinquishment of dower in a deed, which was not avoided for actual fraud, but construed to operate, under the act of 1856, as an assignment of the grantor's property for the benefit of creditors. The fact that the commissioner or his auctioneer, when selling the 71 acres of land, proclaimed that the appellant had a potential right of dower in it, under a misapprehension of the law, might perhaps, have been a ground for setting the sale aside at the instance of creditors, if their rights were thereby prejudicial; but it did not have the effect of restoring to the appellee her right of dower in the land (*Burton vs. Robinson*, decided December 8, 1870).

Wherefore the judgment is reversed and the cause remanded for a judgment in conformity with this opinion.

Harrison, for appellant.

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H. C. THOMAS v. ELI DEAN.

Wills—Construction.

A clause in a will "should any of my children die before they have obtained 21 years of age, or have children, then their estate hereby devised, is to be equally divided between all my children," held to mean, "children living at the death of the devisee."

Same—Descent and Distribution.

Under this clause, the devisee married before she was 21 years of age, and had one child, which died a few days before she did. The husband could not inherit or take under the will, as the estate descended to the brothers and sisters of the deceased wife.

APPEAL FROM GRAYSON CIRCUIT COURT.

September 26, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

James W. Wortham died in the county of Grayson leaving his widow surviving him and several children, some of whom minors. He also left a last will and testament in which after making various devises to his children, the following clause is inserted: *should any of my children die before they have obtained twenty-one years of age or have children, then their estate hereby devised, is to be equally divided between all my other children.*

One of the daughters of the devisor (Kitty J. Wortham) intermarried with Eli Dean and had by him one child, this child lived but a few moments, and the mother died in a few days after the child. Kitty the wife of Dean died under twenty-one years of age, and her estate, or that devised to her by the will was still in the hands of her statutory guardian except some portion that had been paid over to her husband and expended for her own comfort. This suit is brought by the devisees of James Wortham against Eli Dean and the guardian of his wife for a settlement of the estate in which they are asserting claim to all the property devised by the will to Dean. Dean is also asserting claim to the property by reason of his marital rights. The rights of the parties to this property depends upon the construction of that clause of the will already quoted. In order to arrive at a proper

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construction of this clause the court must ascertain the intention and meaning of the deviser from the language in the will. The words used by the maker of a will must be taken in the sense in which they were used at the time. It is manifest that he intended, if any of his children, died under twenty-one years of age, that his or her portion should go to the surviving children of the deviser in the event the devisee died without having a child or children. If he had used the words "*if she die without children*" there would then be no room for construction, and we are of the opinion that the words, "*or have children*" or "*having children*" conveys the same meaning and evidences the same intention, dying under the age of twenty-one years without children"; "*dying under twenty-one years, or have children.*" Any of these expressions when applied to the provisions of this will would mean children living at the death of the devisee. The 9th section of chapter 80, Revised Statutes, provides: "That every limitation in a deed or will, contingent upon the dying of any person without heirs or heirs of the body, or issue or issues of the body, or children or offspring, or descendants shall be construed as a limitation to take effect, when such person shall die leaving such heir, or issue, or child, &c." When the deviser wrote this will he evidently had no other idea on his mind than that the words "*dying under twenty-one, or have children*" meant children living at the death of such of his children as might die under twenty-one years of age. If the devisee died under twenty-one years of age without a child or children to take from the one dying, then his or her interest passed to the survivors. This construction strikes the mind of the chancellor upon reading the will as sustaining the meaning and intention of the deviser when he wrote the paper. The court below having adjudged the property to belong to the husband the case is reversed with instructions to set the judgment aside and for further proceedings in conformity with this opinion.

Wintersmith, Conklin, for appellant.

Kincheloe, for appellee.

Opinion of the Court.

J. T. SULLIVAN, & CO. v. W. G. SIMPSON'S ADMR.**Conversion—Moneys Deposited With Trustee.**

Where currency is placed in an envelope, and delivered to a party to keep, it is not a conversion, for that party to place several hundred dollars of his own money in same.

Same—Identification—Sufficiency—Proof.

It is a sufficient identification of money placed in an envelope to keep, that certain money was found in said envelope, corresponding in amount. The onus was not on the claimants to establish that the notes found are the identical notes delivered. Those denying, must establish that they are not.

APPEAL FROM OWEN CIRCUIT COURT.

September 9, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The evidence presented by this record leaves no doubt upon our minds that the package containing two thousand dollars, delivered to Simpson's Administrator by his widow, was the same package delivered to the deceased by the appellants a few days before his death.

Simpson held this money as the agent of appellants, and unless before his death he did some act or acts amounting to a conversion or unless its identity was lost by being mixed with the private funds of the deceased, it seems to us the administrator should be required to restore it to the rightful owners.

It is more than probable that Simpson after reaching home, placed in the package of money belonging to appellants six or seven hundred dollars of his own means. And it is clear that at least one thousand dollars of their money was appropriated to the payment of his individual debt to the bank in Louisville. To this extent he converted their money to his own use, and for said amount he became to them an ordinary debtor. The remainder of their money the two thousand dollars, in the envelope, was never converted unless the mere fact of placing with it a small amount of his own funds was of itself a conversion. We

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are of opinion that Simpson did not intend that this act should have any such effect, and are not prepared to decide that the law will imply a conversion, where there is no satisfactory evidence that anything of the kind was intended. The identification of the money by appellants is we think sufficient. It was found in their envelope, and if it had ever been intermixed with the funds of Simpson, it was done without their knowledge or consent. The onus is not upon them to establish that the notes found are the identical notes delivered by them to Simpson.

Those who claim under Simpson or through him as his representatives or creditors must establish that they are not.

The judgment of the circuit court is reversed and the cause remanded with instructions to render judgment on the cross-petition in favor of appellants for two thousand dollars with interest, and that their claim be first paid out of the estate of the intestate.

Drane, for appellant.

Blackwell, for appellee.

WM. HACKWORTH v. J. LOGAN, &C.**Pleading—Answer Containing Record of Another Suit.**

Where, in an answer, reference is made to another suit, alleged to be pending, it is not available unless a copy of the record be filed therewith; or proof showing same.

APPEAL FROM GREENUP CIRCUIT COURT.

September 21, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

By the admissions in appellee's answer, James Logan had got ten from the places described in the pleadings, on the premises, fifteen or sixteen cords of tan bark in excess of the twenty-five cords he contracted for at the price of \$45. For the fifteen or sixteen cords he admitted he owes \$1.50 per cord, taking the admissions as to quantity strongest against him, which would cause the quantity to be fixed at sixteen cords, worth \$1.50 per cord

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will make the sum of \$24, to which add five dollars admitted to be due on the twenty-five cords, James Logan's indebtedness is \$29.

The jurisdiction of the court is not questioned, but Logan says in his answer that the amount he owes appellant had been attached in his hands by Alexander in a suit in the Lewis circuit court, but the record of that suit is not filed, nor is there any sufficient evidence that any recovery has been, or will be had, in that case, or that it is pending. It was erroneous in any view to dismiss appellant's petition. Appellees should have filed a transcript of that suit if it existed, and interpleaded the parties and the court below should, on that being done, have retained the cause until it was judicially decided who was entitled to the fund, and adjudged accordingly. It does not appear that appellant can get a credit with Alexander. And his remedy against James Logan is barred by this judgment. In the absence of a transcript of the record of the suit in Lewis circuit court, judgment should have been rendered in favor of appellant against James Logan for the \$80, and costs.

Wherefore the judgment is reversed and the cause is remanded for a new trial and further proceedings consistent herewith. As the cause must return for further proceedings, J. Logan should be allowed to amend and prepare the case on equitable terms, if in proper time he should offer to do so.

Roe, for appellant.

CHARLES FORSTON *v.* MARTHA FORSTON.

Divorce—Limitation of Action For.

Where, by a petition it is shown, that, abandonment without cohabitation, was not within the limit of one year, it is not an available error that costs were awarded against him.

Same.

After the discovery later of the defect in pleading, it should have been amended to conform to proof of the abandonment.

APPEAL FROM WOODFORD CIRCUIT COURT.

Opinion of the Court.

September 20 1870.

OPINION OF THE COURT BY JUDGE PETERS:

By the imperative language of the statute to entitle appellant to a divorce from appellee, the abandonment on her part must have been for the space of one year without cohabitation. 2 R. S., 17.

The doctrine on the subject of condonation does not apply to this case, as the relief can only be granted on the terms prescribed by the statute. As at the time of the trial of the suit appellant was not entitled to the relief he sought, by reason of the want of sufficient allegations, it is not an available error that costs were awarded against him. If appellant had amended his petition after one year had expired from the last abandonment, which was in August, 1868, and charged the abandonment on her part then to have been over one year, without cohabitation, there is no reason appearing in the record which should have defeated him in his suit. But as he failed to amend, and the dismissal of his suit on the grounds stated in the judgment will not bar a subsequent suit for a divorce, the judgment must be affirmed.

Porter & Greathouse, for appellant.

Turner & Twyman, for appellee.

WM. P. CALVERT v. LOUISVILLE JOURNAL CO.**Accounts—Acknowledgment of Indebtedness.**

Where from the evidence, it is shown that an account made out and presented to one member of a firm, was objected to in one item only, which he directed to be corrected, held sufficient to justify an action for an indebtedness due at that time.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

September 30, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The accounts are not presented in this record in an intelligent and satisfactory manner, if account "A No. 1," made out by

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Lynch and referred to in his deposition, is copied in the record, the court has failed to see it:

This witness states that the account *A No. 1* was shown to Mr. Osborne, the business partner of the concern, and he made but one objection to it, the account was then corrected to conform to his view, that account showed a balance in favor of appellant, but what that balance was this record fails to show. And Mr. Osborne says when appellant's account was shown to him he saw the mistake in the last item, which he directed Mr. Lynch to correct; he made the correction, and until then he says he did not know his firm owed Calvert anything. This was certainly an acknowledgment of an indebtedness to the amount of the balance of the account thus corrected.

Mr. Osborne establishes the faithful and skillful discharge of the duties of Lynch, Perrin and appellant. Perrin succeeded Lynch as bookkeeper and cashier of the concern, and he states the books show correctly the amounts collected by appellant, as well as what he retained out of those collections. He also proves that Mr. Osborne made a memorandum on the last account (which we understand to be the account on ledger No. 2, page 68), in pencil after Calvert left to settle the account, which he did by entering a credit to Calvert of \$100 per month.

A part of the time at least appellees were paying appellant \$100 per month and at no time less than \$1,000 per year, unless it be in 1861 and 1862, but how long the reduction in his salary was continued does not appear. Enough, however, appears in the record to show that some amount was due appellant which could be manifested by inspecting the books of the firm with the explanations of Lynch and Perrin. The controversy certainly could be easily correctly settled if the case could be referred to an intelligent master. But as it appears from Osborne's statement that a balance is due to appellant his petition was improperly dismissed.

Wherefore, the judgment is reversed and the cause remanded for a new trial and for further proceedings consistent herewith.

Mundy, for appellant.

Thompson, for appellee.

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WOLF COHAN v. O. S. TENNY.

Principal and Surety—Bills and Notes—Instructions.

In an action against a surety on a note, dated at Cincinnati, O., but actually endorsed while in Kentucky, an instruction was erroneous, that would in effect have made the enquiry, whether the contract was or not completed in Ohio, depend alone on the proof as to the place at which the transferred notes were actually received by the plaintiff, thus precluding evidence conducing to prove a delivery of the notes in Kentucky to an agent.

Same.

An instruction was erroneous, that in effect made the *lex loci contractu* depend solely on the place at which the mere act of endorsing the notes occurred, whether they were actually or constructively delivered in this state or not.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

May 17, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellant, a citizen of the state of Ohio, brought this action in the Montgomery circuit court against the appellee, as endorser of several obligations signed by S. Bachman, in the form of promissory notes made payable to the order of the appellant at a banking house in the city of Cincinnati, Ohio. These notes having the character and effect of bills of exchange by the law of Ohio, while they were only simple promissory notes according to the law of this state; and the holder having failed to prosecute Bachman to insolvency with the diligence necessary to hold the appellant bound, if his responsibility was only that of an ordinary assignor, the essential question presented by the defense and involved in the trial, was, whether the undertaking of the appellee, as implied by his endorsement of the notes was in fact made and consummated in this state or the state of Ohio?

While the evidence conduces to the conclusion that the notes, which were written at Cincinnati, and probably there signed by Bachman, were endorsed as assigned by the appellant at Mt. Sterling, in Kentucky, it is not determinate or certain as to the

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question whether the contract of the appellant was completed simultaneously with the physical act of endorsing the notes in Kentucky, by either a delivery of them to the appellant, or any agent of his, or such a transmission of them, by mail or otherwise, as was legally necessary to make the transfer of the notes to the appellant, effectual and binding on the appellee. The principles of law applicable to this inquiry of fact are so fully stated and explained in the cases of *Goddin v. Shipley*, 7 B. Monroe, 575; *Young v. Harris*, 14 B. Monroe, 556; *Carlisle, etc., v. Chambers*, 4 Bush, 268, and *Ford v. Buckeye State Insurance Co.*, 6 Bush, 133, as to render more than a simple reference to those cases unnecessary.

It seems to us that neither the instruction asked by the plaintiff, which was refused, nor that asked by the defendant, and given by the court, was a correct presentation of the law of the case; the first was not because it would, in effect, have made the inquiry whether the contract was or not completed in Ohio, depend alone on the proof as to the place at which the transferred notes were actually received by the appellant, thus virtually precluding the consideration of any evidence conducing to prove a delivery of the notes in Kentucky to an agent of the appellant, or their transmission to him by the appellee, with his executed endorsement upon them; and the instruction which the court gave was erroneous because it, in effect, made the *lex loci contractus* depend solely on the place at which the mere act of endorsing the notes occurred, whether they were actually or even constructively delivered in this state or not.

For the error in giving the last mentioned instruction, the motion for a new trial should have been sustained.

Wherefore, the judgment is reversed and the cause remanded for a new trial and other proceedings consistent with this opinion.

R. Reid, for appellant.

Tenney, for appellee.

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GEO. S. MITCHELL, &C., v. JOHN WHITMORE, &C.

Life Estate—Seizen, What Constitutes—Dower and Curtesy.

Held, that a parcel of land which was being surveyed, the courses and distances being an actual seizen of the entire tract by all co-parceners jointly, though it continued but a moment, and was sufficient in law, to invest the husband of one of the co-parceners with the right to hold a life estate by the curtesy in the respective individual interest.

APPEAL FROM JESSAMINE CIRCUIT COURT.

May 13, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The real question involved in this suit is whether Frederick Whitmore, the ancestor of the appellees, held a life estate as tenant by the curtesy, in that portion of the land conveyed by Marrs, to which his declared wife was entitled as one of the heirs of William Hinds.

It is insisted that he did not hold such estate, because there was no actual seizen by him of his wife's estate in said land during coverture. That the entire tract was divided into two distinct and well-defined parcels, and that his seizen did not extend to any portion of the tract outside of the parcel conveyed by the remaining heirs to him. This proposition is correct unless there was an actual seizen by one or more of the coparceners before the partition between Whitmore and Marrs. Of this fact we think there can be no doubt. While it does not appear that any of the coparceners resided upon the land after the death of William Hinds, and before the partition, the conveyance from the heirs to Whitmore and Marrs establishes conclusively that the partition between them was made by an actual survey. The parcels allotted each and described by metes and bounds and the courses and distances given with scrupulous exactness. While this survey was being made, there was an actual seizen of the entire tract by all of the heirs jointly, and though it continued but for a moment, it was sufficient in law to invest the husband of the female coparceners with the right to hold life estates by the curtesy in their respective undivided interest. It is true that Williams in his work on Real Prop-

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erty, seems to regard the possession by the husband of the land of the wife held in coparcenary as insufficient to entitle him to take by the curtesy. But Mr. Kent defines the rule to be that "when a man marries a woman, seized at any time during the coverture of an estate of inheritance in severalty, *in coparcenary*, or in common and hath issue by her born alive * * * he holds the land during his life by the curtesy of England. (Kent's Com. vol. 4, side page 28.) Although we have been unable to find any decision of this court upon the exact question in issue, we think the reason of the law is clearly with Mr. Kent, and are of opinion that Whitmore held an estate for life in the undivided interest of his deceased wife in the land conveyed to and held by Marrs and his vendees. We are of opinion that the verdict of the jury is fully sustained by maintainable evidence, and that if the evidence complained of as being incompetent had been excluded the verdict would necessarily have been the same. The revision by the appellees of the slight excess of land found for them fully cured this error.

Perceiving no error in the proceedings prejudicial to the substantial rights of the appellant, the judgment of the court below must be affirmed.

Huston, James, for appellant.

Kinkead & Darnall, for appellees.

 F. S. TUPMAN v. F. DUOKER, & CO.

Fraudulent Conveyance—Assignment of Note.

Where a person procures the assignment of a note to himself, though it be not understood by the assignor, it being as security for advances made by the assignee, no fraud can be charged in the transaction.

Deed—Conveyances—Lien—Laches.

In a deed by a grantor and his wife, no mention was made to the vendee of a lien retained in the prior deed conveying to the grantor said land. Held that the purchaser was guilty of laches in not ascertaining the existence of the prior lien retained in the former deed.

APPEAL FROM KENTON CIRCUIT COURT.

September 11, 1871.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

We are of opinion that the proof presented by this record does not warrant the conclusion that Ducker was overreached by Tupman in the transaction resulting in the assignment by the former to the latter of the note due from Hall and wife. Possibly he may not have fully understood the legal effect of the written transfer, but there is no evidence tending to show that he was misled upon this point by any statement or representations made by appellant. In fact, he does not charge by his answer that he was, but merely claims that he signed the writing at the request of Tupman, he not being able to read it, and it not having been read, or explained to him by any person present.

As Tupman was advancing the money for the accommodation of an insolvent kinsman it was perfectly natural that he should have availed himself of the only security for the repayment of such advancement it was within his power to obtain. By becoming the purchaser of the note and having it assigned to him by the payee. He satisfied the creditor's claim, and became the owner of the note and the lien retained in the deed to secure its payment. That he took such steps to secure himself does not raise the slightest presumption of a fraudulent intent upon his part, and as to this branch of the case, it presents no defense to the action. Tupman, as assignee of the note, was in equity the owner of the lien reserved to secure its payment. And it was not within the power of Ducker and Hall and wife by a transaction subsequent to the assignment to deprive him of the benefit of this lien, and the conveyance by Hall and wife to Ducker of the house and lot did not have that effect. The note was still an incumbrance upon the property in the hands of Ducker, and Shroeder, his vendee, took it subject to such incumbrance.

The fact that the conveyance from Hall and wife to Ducker makes no mention of this note can not affect Tupman's rights, nor can the want of actual notice upon Shroeder's part protect him as against Tupman's lien. This lien was created by the original deed from Ducker to Hall and wife, and the recording of that deed was constructive notice of its existence to the world. If Shroeder failed to make a thorough investigation of the title to the property he was purchasing, it is not within the power of the courts to relieve him against the consequences of his own carelessness and folly.

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From these conclusions it results that the judgment of the circuit court is erroneous. Wherefore, it is reversed and the cause remanded with instructions to enforce the lien retained in the deed from Ducker to Hall and wife to secure the payment of the note upon which this action is based and for proper proceedings.

Ellis, for appellant.

J. W. Hampton, for appellee.

W. N. WORTHINGTON v. JAMES CRUTCHER, &C.

Principal and Agent—Liability of Agent.

If an agent has by a deviation from his orders, or by any misconduct, or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts, or omissions, by the principal, if made with a full knowledge of all the facts and circumstances.

Same—Fraud or Collusion.

In the absence of a charge and proof of fraud upon the part of the agent, the principal cannot be heard to attack the agents acts, thus ratified by him.

Brokers—Right to Dispose of Stocks—Pledges.

A contract by a broker and his customer, "It is agreed between C. and W. that if the margin became exhausted, W. should sell said stock and any loss sustained on such sale of said stock should be paid by C. to W.," and, "W. was to carry and hold the stock for an account of C. until W. should be directed by C. to sell said stock or to deliver same to C." Held, that W. was the agent of C. to the extent to sell said stock, and that W. held and carried the stock under a contract of pledge.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

June 24, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The state of facts presented by this record differs materially from that upon which the opinion of the New York Court of Appeals in the case of Markham v. Jondon et al was founded. In

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that case "the defendants, who were stock brokers, made an agreement with the plaintiff to purchase and 'carry' certain stocks for him, he to place in their hands ten per cent of the market price of the stocks as a 'margin' and to keep that margin good. Defendants purchased the stocks, and carried it until it fell in value, so that their margin was not good, and after notice to plaintiffs to make it good they sold the stock." The action was for the conversion of the stocks. Upon the trial defendants offered evidence to prove that it was the custom of brokers to sell the stocks in such cases on the exhaustion of the margin and also that the contract in the case was the usual one between brokers and their customers and governed by such custom. The court held that the stocks purchased in pursuance to such contracts were the property of the customer; that the broker was a mere agent in making the purchase, but that he held and carried the stocks for the purchaser, not as an agent or broker, but upon a new duty, and with other rights, and subject to additional responsibilities; that the contract between the parties was, in spirit and effect, a contract of pledge; that as to the advancements made by the defendant for the plaintiff, the stocks were held as collateral security, and that he had no right to sell them and apply the proceeds to the payment of such advancements, until he should first call upon the plaintiff to make good his margin, and failing in this, the customer was entitled, secondly, to notice of the time and place where the stock would be sold, which time and place must be reasonable, and that the custom of brokers could not change or abrogate this well established rule of law. That in order to enable the broker to protect himself from loss, by the exercise of powers, other and greater than those growing out of the ordinary contract of pledge, he must secure the right to sell without notice by a special contract. In this case it is proved by the witness Bullington (and his testimony is not contradicted) that "it was agreed between * * * Crutcher and * * * Worthington that if the * * * margin became exhausted * * * Worthington should sell said stock, and any loss sustained on such sale of said stock should be paid by said Crutcher to said Worthington." Bullington's statement as to his condition of the contract is strongly corroborated by Crutcher's letter of October 30th, 1868, with a full knowledge of the fact that Worthington had sold his stocks, he writes that he regrets the sale of his "Erie" at 39 7-8, as he did not think it would have gone

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lower, and requests Worthington, if he agrees with him in opinion, to buy it back for him, and concludes by promising to settle the balance due from him an account of the stock speculation "with as little delay as possible." By his letters of April 13th and December 6th, 1869, he still agrees to pay this balance, and in none of these letters does he intimate that the stocks were sold without authority. But if it be admitted that the sale was made without express authority growing out of the terms of the original contract, it appears from appellee's petition that Worthington was "to carry and hold the '*stock*' for and on account of plaintiff, until the defendant should be directed by plaintiff *to sell* said stock, or to deliver the same to plaintiff." It was contemplated by the parties according to appellee's own version of the contract that upon a certain contingency (when appellee should so direct), Worthington was to sell. He was, therefore, the agent of Crutcher to this extent, although according to the doctrine in the case quoted of *Markham v. Jondon* held and carried the stock under a contract of pledge. The substance of appellee's complaint in this view of the case is that Worthington in the exercise of his duties as agent, exceeded his authority and sold the stocks without being directed so to do. To this it is answered that the sale was ratified and accepted by the principal and acted upon by both parties from the 30th of October, 1868, when Crutcher was advised by Worthington of the sale, and of all the particulars as to time, price, etc., up to the 13th of June, 1870, when this suit was instituted.

In such a state of case the doctrine seems to be, that if 'an agent has, by a deviation from his orders, or by any misconduct, or omission of duty, become responsible to his principal for damages, he will be discharged therefrom by the ratification of his acts, or omissions, by the principal, if made with a full knowledge of all the facts and circumstances,' (Story on Agency, section 243) with a full knowledge of the time and terms of the sale, with a full statement of his account, rendered at his own request, which is not charged to be false or fraudulent. Crutcher ratified the actions of his agent, by his letters, by the execution of his note for the amount of loss incurred in the speculation, by withdrawing his defense and permitting judgment to go against him on said note, and by the execution of the replevin bond to secure the payment of said judgment, and he can not now be allowed to escape the consequence of such ratification, without charging or proving either fraud upon the part of the appellant, or surprise or mistake upon his own part.

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We are of opinion that the facts presented by the record satisfactorily establish Worthington's right to sell the stock under the terms of the original contract, and hence that there was no conversion by him of the property of the appellee, but if mistaken in this conclusion, then that the act of Washington in making the sale, was approved and ratified by Crutcher.

For these reasons the judgment of the chancellor is reversed and the cause remanded with instructions to dismiss appellee's petition, and to dissolve the injunction granted upon his prayer.

Bullock & Anderson, for appellant.

Cochran, for appellee.

R. K. WILLIAMS v. T. J. ASHBROOK Co.

Contracts—Place to be Performed—Terms of.

A contract: "Paducah, Ky. * * * B. K. Williams has agreed to let us take one half interest in 150 barrels rectified whisky which he contracted for from them Dec., 1864, at \$1.82 per gallon. * * * We are to divide profits, * * * and to charge nothing for accepting or selling." This whisky was contracted for by Williams at Cincinnati, to be shipped on his order. Held that the meaning of the contract was that the whisky was to be sold in Paducah, the place where the contract was to be performed.

Same—Partnership.

In a contest between the parties to this contract, the element of partnership could not enter in same.

APPEAL FROM GRAVES CIRCUIT COURT.

June 28, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

On the 1st of December, 1864, R. K. Williams bought of Buchanan & Co. of Cincinnati five hundred barrels of rectified whisky at the price of 1.82 cents per gallon, to be delivered to the purchaser, or his order in such lots as he might desire.

On the 24th of January, 1865, Williams and J. T. Ashbrook & Co. entered into the following agreement:

"Paducah, Ky., January 24, 1865.

"R. K. Williams has agreed to let us take one-half interest in

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150 barrels Buchanan & Co. rectified whisky, which he contracted for, from them in December, 1864, at 182 cents per gallon.

"We have agreed to accept his paper as per letter of authority of this date, after paying the purchase price, and all interest on deferred payment, and other costs. We are to divide profits, one-half to said Williams, one-half to T. J. Ashbrook & Co. We are to charge nothing for accepting or selling.

"R. K. Williams.

"T. J. Ashbrook & Co."

It appears that at the time of the execution of this agreement T. J. Ashbrook & Co. were grocery merchants at Paducah, and soon afterwards sold the whole of the whisky in Cincinnati without ever having removed it from the warehouse in which it was stored. That the sale was made by them without the knowledge, or consent of Williams at a loss of \$1,328.32, one-half of which they claim should be paid by Williams. He denied his liability for any part of the loss, on the ground that Paducah was the place at which, by the terms of the agreement, the whisky was to have been sold by Ashbrook & Co., and that they had no right to sell the whisky in Cincinnati without the knowledge or concurrence of Williams.

Upon a case agreed by the parties, and submitted to the court below judgment was rendered against Williams for one-half of the loss on the sale of the whisky. And Williams has appealed.

In support of the judgment, it is insisted by counsel for appellees that the written agreement created a partnership between the parties as to the 150 barrels of whisky, and that either partner had full authority to dispose of the whole or any part of the assets, whenever and wherever he chose.

If this were a controversy between the parties to the agreement and a stranger, the question of partnership or no partnership might become important. But the contest is between the parties themselves and the only question is, what did they mean, or intend by entering into this contract? What rights or obligations did they intend to impart, and impose on each other?

This question, like all others growing out of contracts in writing, is a question of construction, and is to be solved by considering the language used in the writing in the light afforded by the situation and circumstances surrounding the parties at the time.

The appellant at the date of the contract was one of the judges of this court, and at the time of the sale, engaged in the discharge of his duties in Frankfort.

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Appellees were grocery merchants, engaged in the business of buying and selling commodities, including whisky, as usually belonging to the grocery trade. As already stated, appellant owned five hundred barrels of whisky which at the date of the contract were in store in Cincinnati, and had been since his purchase of them on the 1st of the month preceding the sale to appellees. Under these circumstances the contract in question was entered into, by which, in effect, appellees purchased one-half of 150 barrels of the whisky owned by appellant. The object doubtless being that the whisky might be sold at a profit, and the controlling question in the case are, first, who was to do the selling? and, second, where was the selling to be done?

There is no difficulty in the first question. Not only was the selling of such merchandise strictly within the line of the regular business of appellees; but there was an express stipulation in the written contract that they were to charge nothing for accepting or selling, showing beyond dispute that the duty and responsibility of selling was expressly devolved on appellees—this their counsel concede.

Second. It would seem naturally to follow, that as appellees expressly stipulated that they would sell the whisky, the selling was to be done by them, or under their immediate supervision and at their place of business in Paducah. For it can be scarcely doubted that their experience, capacity and skill as merchants entered largely into the inducements with appellant to make the contract. He then had five hundred barrels in the hands of merchants in Cincinnati, and he could have put the whole or any part of it on the market there at any time. He, therefore, could have had no conceivable motive to let the appellees take the one-half interest in the 150 barrels, if it insisted, they were to have the privilege of authorizing a sale whenever they chose, and at the place where the article then was, and had been for some time stored, and where Williams could have as easily authorized the sale without the arrangement with appellees, and without their agency, as with it. We do not believe the parties contemplated such a disposition of the whisky. Appellant certainly did not.

There is enough in the record to show that at the date of the agreement, whisky was dull in the Cincinnati market.

The contract was made in Paducah; the bills for the price of it were made payable in Paducah. Appellees were to sell the whisky without charge therefor, their place of business and their only

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place of business so far as the record shows was at Paducah. And it seems to us that Paducah was the market contemplated by the parties that the whisky was to be brought to that point and there sold by appellees, or under their personal direction. This, we think, was clearly the intent of the parties, and the only rational interpretation of their written contract.

The sale as made by appellees, although in good faith, was not in conformity with the contract, and they have no right to hold appellant responsible for any part of the loss resulting from the sale. Wherefore, the judgment is *reversed* and the cause remanded with directions to dismiss appellees' complaint.

J. B. Husbands, Williams, for appellant.

L. D. Husbands, for appellee.

MARGARET GARTIN v. JAMES H. LUCKER, SR'S. AD.

January 3, 1872.

Trial—Duties of the Court—Jury.

Sec. 34 of the Civil Code makes the jury the triers of questions of fact, but it does not take away from the Judge the right to determine whether or not any fact conducing to establish the cause of action, or the grounds of defense, has been proved. This should be determined by his instructions.

Bills and Notes—Charge of fraud—Not sustained by facts.

APPEAL FROM MARION CIRCUIT COURT.

December 8, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The only issue raised by the pleadings in this case is, that the note sued on was procured by deceit, fraud and covin.

The onus was upon the appellant. She utterly failed to establish a state of case exciting even a suspicion of fraud on the part of Dr. Lucker. She showed that near six hundred and thirty dollars of the consideration for the note had actually been paid for her benefit by Dr. Lucker, and she bases her allegation of

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fraud upon the ground that she failed to show what the balance of the consideration was.

The witness to the note did not see it drawn, nor was he present when the settlement or calculation was made. The son of Mrs. Gartin, one of the signors on the note, who could both read and write, was present when the calculation was made and the note written and yet he with a full knowledge of all the facts signed it without hesitation.

Fraud is not to be presumed. The balance of the consideration for the note not only might have existed without the witness, Wray, knowing anything about what it was, but in fact he states that Lucker had, before the note was executed, had wood hauled to the appellant. Section 34, of the Civil Code, makes the jury the triers of questions of fact, but it does not take away from the judge the right to determine whether or not any fact conducing to establish the cause of action, or the ground of defense has been proved. This question he must determine when he is called upon to instruct the jury. His instructions must be based upon evidence.

Appellant having proved no evidence conducing to sustain her defense, he properly refused all instructions she asked, and properly instructed the jury to find for appellee.

Judgment affirmed.

The testimony of the deputy sheriff and his receipt to Lucker show that the execution to Mattingly was paid off on the 7th of October, 1867. The note of appellants to Lucker was given on the same day. His statement to Mrs. Gartin that he had satisfied such execution was therefore true. The money was not paid by the sheriff to Mattingly till the 10th of the same month. If Lucker then took an assignment of the judgment, and afterwards attempted to collect it from Mrs. Gartin, it was a violation of his contract with her. She does not rely on this violation of the contract, as a defense to the suit on the note, and so can not be made to relate back to the execution of the same, and sustain the plea of fraud in its procurement.

Petition overruled.

R. & F. for appellant.

Harrison, Russell & A, for appellee.

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J. T. GREER v. ARNETTE.

Bail Bond—Taken before County Court.

Under Sec. 61 and 67, and Sec. 80, Criminal Code, the county judge has the right to take a bail bond, when the defendant was legally in custody and charged with a public offense, this right extending to any time before the commencement of the first term of the circuit court after commitment.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

April 20, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The answer in this case does not refer to, or in any way bring before the court, the action of the committing magistrates, nor of the judge of the common pleas court.

It is true certain papers purporting to be the records or minutes of proceedings had before these officers are copied into the transcript before us, but for the reason indicated they can not be considered on this appeal.

The recitals of the forfeited bond show that Albert Greer was legally in custody charged with a public offense; that he had been admitted to bail in the sum of seven hundred dollars, and that the bond was taken by the presiding judge of the Crittenden County Court.

By Section 61, Criminal Code, such officer had the right to take such bond at any time before the commencement of the first term of the Crittenden Circuit Court, after his commitment to jail. Nor is it material that said Greer was not brought before such judge upon a written petition as provided for in Section 77, Criminal Code.

The county judge had the undoubted right to take the bond and it is expressly provided in Section 80, that "No bail bond or bail recognizance shall be deemed to be invalid, by reason of any variance between its stipulations and the provisions of this Code, or of the failure of the magistrate or officer to transmit or deliver the same at the times herein provided, *or of any other*

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irregularity, so that it be made to appear that the defendant was legally in custody, charged with a public offense, and that he was discharged therefrom by reason of the giving of the bond & recognizance, and that it can be ascertained from the bond or recognizance that the bail undertook that the defendant should appear before a magistrate for an examination of the charge, or before a court for the trial thereof." Tested by the standard of responsibility fixed by this section there can be no doubt but that the bond and answer of the appellant warranted the judgment of the circuit judge.

Such judgment must, therefore, be affirmed.

Marble, for appellant.

Attorney General, for appellee.

ELIZABETHTOWN & PADUCAH RY. CO. v. DANIEL KLINGLESMTHS.

Eminent Domain—Damages—Instructions.

In estimating damages for land taken, the defendants are entitled to be paid the value to them of the land taken, notwithstanding any enhancement in the value of those not taken, but the jury should be instructed, that in estimating the value of the land taken, the enhanced value, if any, to the entire tract, should not be allowed to enter into their estimate at all.

APPEAL FROM HARDIN CIRCUIT COURT.

April 19, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

There was no error upon the part of the county court in admitting or refusing to admit testimony. Nor can we determine that it did not exercise a sound discretion in regulating the introduction of evidence and the argument of the cause.

The instructions given the jury, however, do not conform to the views of this court or to the law of the case, as expressed in the opinion delivered at this term in the case of this Appellant vs. Helm's Heirs. As appellees are entitled to be paid the value

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to them of the land taken, notwithstanding any enhancement in the value of those not taken, by reason of the construction of appellant's road. The jury should have been instructed, that in estimating the value of those taken, the enhanced value if any to the entire tract should not be allowed to enter into their estimate at all.

The instructions as given, allowed the jury to charge the railroad company with the value. The proposed construction of its road may have added to the land taken, and in this respect they were prejudicial to the party complaining in this court.

The judgment is reversed and the cause remanded for a new trial upon the principles herein indicated.

The questions in controversy between the Wintersmith and the Klinglesmiths can not be settled upon this appeal. One appellee can not prosecute a cross appeal against another, Wintersmith must prosecute an original appeal, which may be done upon this record, but there must be service of process.

Brown & Murray, for appellants.

Wintersmith, for appellees.

ELIZABETHTOWN & PADUCAH RY. CO. v. GEO. STICKLER.**Eminent Domain—Criterion of Damages.**

R. assessed his land at about \$20.00 per acre. The railroad company took three acres and cut off about fifteen from the main land. Held, that a judgment in damages for \$464.00 is excessive.

APPEAL FROM HARDIN CIRCUIT COURT.

April 23, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

It seems to this court that the judgment in this case ought not to be allowed to stand. Stickler assessed his tract of land at about twenty dollars per acre. Allowing it to be worth double that amount, the three acres taken by the railway company would be worth \$120.00. The fifteen acres separated from the main tract by the road would be worth \$600. The judgment is for

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\$464, more than three-fifths of the entire value of the three acres taken, and the fifteen acres cut off by the road, and greatly exceeding the entire value thereof according to the assessment by appellee when acting under oath.

Testing the measure of recovery by the rule laid down in the case of the Appellant herein, vs. Helm's Heirs, this day decided, it is manifest that the damages allowed appellee are unreasonable and excessive.

Wherefore the judgment must be reversed. The cause is remanded for a new trial, upon the principles laid down in the opinion of this court in the above named case.

Pindell, for appellants.

Montgomery, for appellee.

W. W. FOSTER, &C. v. T. T. SHREVE, &C.

Pleading—Amended Answer—Newly Discovered Evidence.

Amended answer examined, and held not to disclose facts sufficient to authorize a new trial, nor defects in pleading made good by new proof offered, a lack of diligence being shown by one of the defendants.

APPEAL FROM BATH CIRCUIT COURT.

January 22, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

By the opinion delivered in this case upon a former appeal, this court adjudged that the judgment appealed from was erroneous in so far as it failed to determine that the heirs of G. W. Rogers were estopped to assert claim against Foster for any portion of the one hundred and twenty acres of land conveyed to him out of the three hundred acre tract devised to Mrs. Susanna Rogers by her father, Weathers Smith, and also in so far as it failed to charge Foster with the price of the slave, Alfred, and the cost of certain other slaves. The concluding paragraph of the opinion is in these words:

“In all other respects, except as herein specified, the judgment is *approved*, but for the errors pointed out the judgment is re-

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versed on the original appeal, and on the cross-appeal so far as the price for which the slave, Alfred, was sold was refused and the cause is remanded for further proceedings consistent herewith."

In so far as it was adjudged that Mrs. Asberry, and the children of Mrs. Shreve were entitled to portions of the land conveyed to appellant, the judgment was not reversed but was "approved," and the further proceedings to be had were to be consistent with such approval.

The case as to the heirs of G. W. Rogers, was reopened by the reversal, but as complete relief could not be afforded appellant as against these heirs without damaging Mrs. Asberry and the heirs of Mrs. Shreve with future litigation upon this branch of the controversy, the judgment was not disturbed. In other words, as to them the judgment upon this branch of the case was affirmed, and appellant could not disturb it by subsequent proceedings, except by petition for a new trial.

His amended answer does not show that he used reasonable diligence prior to the first trial to discover the proof upon which he now relies for relief as against Mrs. Asberry and the children of Mrs. Shreve.

His principal witness, Dr. Barnes, gave two depositions before the rendition of the original judgment, the last one relating almost exclusively to the circumstances attending the conveyance by Mrs. Foster to appellant of the land in contest.

It is not alleged that Barnes did not, when this deposition was given, recollect every fact connected with the transaction, and no reason is given why such facts were not then elicited, except that appellant's attorney did not know that he could make such proof by the witness, and therefore, failed to examine him in reference to these facts. An examination of the last deposition given by Dr. Barnes shows that it was almost impossible for him to have detailed the facts held to estop the heirs of G. W. Rogers, without disclosing the participation of Mrs. Shreve and Mrs. Asberry in the transaction. Besides this, he proves that appellant was himself present, and knew as much about the transaction as the witness. It is possible that he may have forgotten that which he was so much interested in remembering, but the very many important facts his amended petition shows him to have forgotten conduces very strongly to show that he was grossly negligent in the preparation of his case from its beginning up to the promulgation of the opinion of this court.

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We are of opinion that his amended answer does not set up such a state of facts as would authorize a new trial as to these appellees, and that the defects of the pleading are not made good by the proof, even if appellee by their answer waived the right to object to such defects.

Judgment affirmed.

Wadsworth, Turner, Apperson & Reid, for appellants.

Nesbitt and G., Huston & S. S. Goodloe, for appellees.

JANE FRAIN, &C. v. JOHN LUEN, &C. AND H. STEINWEIDE.

Judicial Sales—Void.

A sale of land, under a judgment, in which the defendant, a feme covert, was not joined by her husband, in an amended petition, held void.

Pleading—Amended Petition, after Void Judgment—Parties.

After a judgment had been entered on a petition, Mrs. A. not being a party, an amended petition was filed against Mrs. A. only, and judgment rendered by default, and sale made. Held, to be void, as when the amended petition was filed, the former judgment being void, the original case was not in court, the husband of Mrs. A. not being made a defendant.

APPEAL FROM KENTON CIRCUIT COURT.

December 8, 1870.

OPINION OF THE COURT BY JUDGE PRYOR:

The legal title to the lot in controversy sold by the commissioner to satisfy the judgment rendered in these consolidated causes was in Mrs. Frain—the conveyance made to her was attached as fraudulent, and a judgment rendered subjecting the property to the payment of the several debts due to the appellees.

There was no service of process on Mrs. Frain in the suit of Steinweide and the judgment directing a sale of the property was null and void. The appellee, Steinweide, after the rendition of this judgment finding that Mrs. Frain had not been brought before the court by the service of process filed an amended petition after the rendition of the original judgment and at a subsequent term alleging that she had not been served with process

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and asks for a judgment against subjecting her property to the payment of these debts. She is the only defendant to the amended petition—her husband is not made a party thereto. This amended petition was taken for confessed as against her, process having been served, and a judgment rendered subjecting the property to the payment of the debts in the first judgment mentioned. A sale was made by the commissioner of the lot under this last judgment and Steinweide, one of the plaintiffs, purchased it.

The judgment last rendered, as well as the sale under it, is void and passed no title to the purchaser. When the amended petition was filed the original case was not in court, and in fact a sale had been made under it and that sale confirmed.

The amended petition asks that the case be redocketed.

The husband of Mrs. Frain is not made a defendant to this amendment, and she alone is called on to make defense to it. If regarded in the light of either an original or amended petition the husband should have been made a party.

Although the judgment was void it does not necessarily follow after such a judgment has been rendered that the plaintiff can at a subsequent term without any additional notice to the parties have that judgment violated or by an amended petition vacated, and another judgment and sale of the property made. It is in fact an original proceeding—the first judgment had been executed and a sale of the property made and no second judgment should have been rendered afterwards in the same case and a sale made even between those who were parties and served with process, without consent or acquiescence in the proceedings, by which the last judgment was obtained.

We think the allegations of the petition in the case of Luen was sufficient to authorize a recovery. The petition discloses the fact that the owners of a majority of the front feet petitioned the council.

The judgment must be reversed as to all the appellees so far as it affects the rights of Mrs. Frain and the court below is directed to enter an order vacating the sale and to permit Mrs. Frain to file her answer to the original petition, and for further proceedings consistent herewith.

Mooar, Carlisle, for appellants.

Fisks, for Luen, &c.

Stevenson and Myers, for Steinweide, &c.

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A. A. BURTON v. MARGARET P. ROBINSON.

Husband and Wife—Dower—Contingent Holding.

A wife is not endowed of lands purchased and paid for by her husband, but which he held merely a title bond for, and which the husband had conveyed to creditors by deed of assignment, although at the sale of all lands under the assignment, the officer proclaimed "subject to the right of dower of _____."

Same.

At the sale of said lands, the officer proclaimed that the wife's dower interest was reserved, and this fact was reported to the court by the commissioner in his report of the sale to appellant. Held, that this would not impart any enlargement of her right of dower which she actually had, nor bind the purchaser to yield to her a greater interest, in the form of dower, than she might have enforced against the creditors as vendees of her husband.

APPEAL FROM GARRARD CIRCUIT COURT.

May 24, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

Richard M. Robinson, having title to about 234 acres of land, and being the equitable owner of other lands in his possession, including a tract of about 54 acres, for which he held the bond of Thomas Moore for title, on the 8th day of January, 1866, conveyed his whole estate, real and personal, to a trustee for the payment of his debts; and afterwards by appropriate proceedings, the two parcels of land aforesaid, were publicly sold and purchased by the appellant, as containing about 288 $\frac{3}{4}$ acres, at the price of \$61 per acre; and the sale was afterwards confirmed, and the title of R. M. Robinson, as vested in the trustee, and also the title of Moore to the 54 acre tract, conveyed to the purchaser.

In July, 1869, R. M. Robinson having died, this suit was brought by the appellee, Margaret P. Robinson, his widow, against the appellant, to recover dower in the land, which having been adjudged to her in the entire tract of 288 $\frac{3}{4}$ acres, the defendant has appealed to this court.

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The right of the appellee to dower in the tract of 234 acres, being conceded, the only material question to be decided is, as to her right to dower in the 54 acre tract. It appears from the evidence that although the 54 acres of land had not been conveyed to Robinson at the date of his deed of assignment, he had long before purchased and paid for it; and that at the sale to the appellant, it was proclaimed that said $288\frac{3}{4}$ acres of land were being sold subject to the contingent right of dower of the appellee, and that fact was reported to the court by the commissioner, in his report of the sale to the appellant. It also appears that a previous sale of the same land had been made to another purchaser at the price of \$69.80 per acre under a proclamation that the appellee would unite in the conveyance to the purchaser, and that sale was set aside because of her refusal to do so.

R. M. Robinson being divested of the equitable title to the 54 acres of land, in his life time, by his deed of assignment, for the benefit of his creditors, whose claims exceeded the amount of his entire estate, it is admitted in the argument for the appellee, on the authority of the case of Gully vs. Ray, (18 B. Monroe 107) and other decisions of this court, she had no available right of dower, in that tract of land as against the beneficiaries under the deed of assignment; but it is contended that the superior right of the creditors being waived in favor of the appellee, by the terms of the sale and its confirmation by the court, they operated to estop the appellant from controverting the claim of the appellee to dower in the 54 acres, as well as the residue of the tract. This might be so if the facts were such as to substitute the appellee to the right of the creditors, to the extent of the supposed right of dower, and to imply a contract on the part of the appellant to hold it in trust for her. But the fact that the sale of the $288\frac{3}{4}$ acres of land was made subject to her contingent right of dower, does not necessarily impart any enlargement of the rights which she actually had, nor bind the appellant to yield to her a greater interest, in the form of dower, than she might have enforced against the creditors as vendees of her husband; but had the effect merely, of preventing him from successfully registering the contract, or asserting a claim for indemnity, on account of such legal or equitable right as she had in all or any part of the $288\frac{3}{4}$ acres of land.

It was therefore erroneous to adjudge to the appellee dower.

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in the tract of 54 acres of land; but no objection is perceived to the residue of the judgment.

Wherefore the judgment is reversed and the cause remanded with directions to render a judgment in conformity with this opinion.

Burton, for appellant.

Durham, VanWinkle, for appellee.

R. M. ALEXANDER & WIFE v. JAMES HERRIFORD.

Vendor and Purchaser—Sale in Gross—What Constitute.

A sale of land for \$10,000.00, of which \$7,000.00 was paid cash, and notes given for the balance, was made, the quantity not being stated in the deed, nor a description given by metes and bounds, but only designated by name, and reference to the title papers under which it was held. This sufficiently identified the land. Held, to be a sale in gross, and not by the acre, though the vendee claimed it was represented to contain 800 acres.

Same.

Evidence showed that while the parties were negotiating the deal, the vendor expressed the belief that the land contained over 800 acres; stating at the same time his reasons for so believing which do not appear to have been of a very convincing or assuring character, nor such as may have led him to misapprehend the real quantity of the land. Held, not to constitute fraud or mistake, where it is shown the land contained only 587 acres; this, as to a matter of opinion and fact, being open to enquiries by both parties, and in respect to which neither party can well be presumed to have been misled.

APPEAL FROM CUMBERLAND CIRCUIT COURT.

June 2, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

On the 19th of June, 1868, the appellants, R. M. Alexander and Ellen B. Alexander, his wife, sold and executed their deed of conveyance to the appellee, for two tracts of land, for the gross price of \$10,000, of which \$7,000 were paid down, and the

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appellee gave to Alexander his two notes for the residue—one of them for \$1,000 payable at its date, and the other for \$2,000, payable one year thereafter—the quantity of neither tracts of the land being stated in the deed, nor were the tracts described by metes and bounds, but only designated by name, and reference to the title papers under which they were held, which though sufficiently identifying the land, did not so describe it as to indicate the quantity with any certainty which either tract contained.

This suit having been brought on the notes for the deferred payments, the defendant filed an answer and cross petition denying that he had accepted the deed, which had been recorded; and alleging in substance and effect, that he had entered into the contract in ignorance of the true quantity of the land, but confiding in statements and representations made by Alexander at the time that there were not less than 800 acres in the two tracts, and that he had since discovered that these statements and representations were false and fraudulently made; there not being more than 587 acres of land in the two tracts. And on these grounds the defendant sought alternatively a rescission of the contract, or an abatement from his notes of an amount equal to the alleged deficiency in the supposed quantity of the land.

The material averments of the answer being contradicted by a reply, the cause progressed to a final hearing in equity; and the court being of opinion that the defense was sustained, adjudged that the true quantity of the land be ascertained by a commissioner and that the notes be abated by any deficiency found to exist—assuming the quantity intended to be embraced by the contract to have been 800 acres; and to reverse that judgment this appeal is prosecuted.

According to the plain and literal import of the written evidence of the contract, the sale was strictly and essentially in gross without reference to any estimated or designated quantity of acres; and according to principles, too often recognized by this court, in the construction of written contracts, to require the citation of any authority to sustain them, the appellee was not entitled to any relief against the terms of the agreement, on the ground of mistake or fraud, on the part of Alexander, unless the proof was such as to plainly and clearly establish it, to the extent of showing the variance between the real and expressed understanding of the appellee to be such as to render it incon-

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scientious and inconsistent with good faith to enforce the written agreement according to its tenor and legal effect.

The testimony of one witness, who, at the instance of the appellee, made a somewhat imperfect survey of the land, conduces to the conclusion, that the two tracts of land did not contain more than 587 acres; and there is satisfactory evidence in the record, that while the parties were negotiating the tracts, R. M. Alexander expressed the belief that the two tracts contained over 800 acres; stating at the same time his reasons for so believing; which do not appear to have been of a convincing or very assuring character; nor such as may not have led him to misapprehend the real quantity of the land; and innocently to misrepresent it, in the absence of a careful or complete survey or other reliable evidence of the true quantity. And it moreover appears, that the appellee was himself well acquainted with the land and resided upon it at the time of his purchase. It is important also to observe that there is neither allegation nor proof that the deed was not written in accordance with the wishes and dictations of the parties at the time, and is not as explicit in the description of the land as was desired by the appellee; and it is not pretended that any particular land was understood to be embraced by the sale, which the subsequent survey proved, does not include; and while it appears that there were improvements on the land, which were occupied by the appellee, it is not shown what proportion their value have to that of the entire land embraced by the deed, nor what were the relative values of different parts of the land.

Testing the case, as it is thus substantially exhibited in the record, by the settled principles, on which alone, a court of equity can interpose to grant relief against the express terms of a written contract, the judgment of the court below can not be sustained.

If it be conceded that the alleged misrepresentation as to the quantity of the land, is proven with reasonable certainty, the evidence fails to satisfy us that it was fraudulent, or known by Alexander, at the time, to be untrue. It was moreover as to a matter of opinion and fact, open to the inquiries of both parties, and in respect to which, under all the circumstances of this case, neither party can well be presumed to have been misled as claimed by the other. (Fry on Specific performance of contracts, section

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425. *Brown vs. Parish*, 2 Dana 6. 1 Story's Equity Jurisprudence sec. 191).

Wherefore the judgment is reversed and the cause remanded with instructions to render a judgment for the plaintiffs in conformity with this opinion.

Garnett, Baker & Walker, Alexander, for appellants.
James, for appellees.

ELIZABETH BRIDGES, ET AL. v. WM. BURNE, ET AL.

Estates—County Court Settlement.

In the absence of proof, surcharging a county court settlement of an estate, it is prima facie evidence of its own correctness, and the party assailing it must overcome by proof this presumption in its favor.

Same—Division Among Heirs—Acceptance.

Where there has been a division among heirs of an estate left by the testator, and each party took and enjoyed his pro rata, a subsequent action to set same aside by one of them, with no offer to refund the money received, or beneficial interest derived by virtue of the agreement of division, cannot be maintained.

APPEAL FROM BATH CIRCUIT COURT.

May 3, 1871.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The testator, John Jones, died in March, 1851, leaving a large landed, slave and personal estate to his widow, children and devisees.

As by the will and laws of the land the widow would be endowed for life of one-third of the slaves and land and entitled absolutely to one-third of the personalty, after payment of debts, and as the children and devisees desired the immediate enjoyment of their interest unencumbered with the widow's life estate they and the widow contracted, April 14, 1851, in writing, that she should surrender her rights of dower and distribution under the will and that in place thereof they sold her one-seventh part of her deceased husband's estate of every kind absolutely

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after deducting the specific legacies therein named, and the commissioners who had previously been appointed by the county court to divide the estate were directed to divide the land into seven equal parts, which was accordingly done, and each beneficiary took the lot assigned them, including the widow. And November 19, 1851, the children and devisees, including Hiram Bridges and his wife, Elizabeth, and her brother, T. T. Jones, who had been appointed her trustee by the testator conveyed to the widow by proper deeds the title to the lot of land so assigned her by the commissioners.

The widow, Mrs. Jones, took immediate possession of the land, and slaves assigned her and so continued to hold such as she had not sold until her death in 1859, when her executors in pursuance of her will sold land and slaves, etc.

All parties abided by this family arrangement until 1862, when Mrs. Bridges and her children brought this suit asserting an interest of one-sixth in the widow's estate predicated upon the idea that the original agreement and all subsequent conveyances to the widow were illegal and void and this without any offer to refund the money received or any beneficial interest derived by virtue of said agreement and conveyance by her of her dower and distributable interest in testator's estate to said devisees.

The seventh clause of testator's will is as follows:

"I bequeath to my two daughters, Elizabeth Bridges, later Elizabeth Jones, and Lydia L. Bayo, later Lydia L. Jones, each one equal part with the rest of my children hereafter named of my estate, real and personal and mixed, and each one's portion shall be held in the hands of my hereafter named executor to give out for their use and benefit and their husbands shall have no control over it in any manner whatsoever, to sell, rent or hire or receive it under their control in any manner but the power to *sell*, rent or hire shall be with my executor for their use and at the death of either of them or both of my daughters above named their part personal, real or mixed, shall go to their children, except Elizabeth Bridges' son-in-law, Moseley, he shall not come in for any part whatsoever, but my daughter's part in the hands of my executor shall be divided out by him to the rest of my daughters' children."

It is evident the testator intended to vest the entire title, with the right of disposition, sale, etc., in his son, T. T. Jones, who he appointed his sole executor. The right to sell the land and

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slaves were as full and ample as the right to pay over the money to his sister and in fact no distinction was made between real and personal estate.

The unlimited right to the use of all was secured to her under the supervision and control of the trustee, and whatever might not be consumed during her life whether money, slaves or land was then to go to her children, save one.

But were this not so still how can we say that both her and her children have not gotten their part.

Had they filled a petition asking the chancellor in view of all the circumstances to allot to the surviving widow absolutely an equivalent for her dower interest and she had consented we can not doubt but that the chancellor would have so ordered and made an equitable allowance to her and the one made by the devisees and Mrs. Bridges and her trustee being not more liberal than we suppose was just and equitable after all parties have acted on it for more than eleven years the chancellor should not disturb it.

Whilst Mrs. Bridges and her children did not get the precise interest devised, yet they got its equivalent, and though the agreement and conveyance might be defective in their execution the chancellor would not loan his power to them on any but equitable terms, and if the terms of the original agreement be not inequitable he will not disturb but rather confirm the arrangement.

As Mrs. Bridges and her children derived a great benefit by the conveyance of the life interest of the widow in the land and slaves and the distributable interest in a large personal estate they should account for all this before being permitted to disturb this family arrangement which they in no manner propose doing.

It is scarcely necessary to determine whether by various acts she and her children are estopped from any assertion to the property assigned to the widow, although some causes of estoppel are imposingly presented, but as the original partition of the property by the acts of the parties so nearly conform to what the chancellor should and would most probably have done that no court of equity should now disturb it.

No motion was made to refer the cause to a commissioner and we can not say that the failure to do so, by the court, when no such application was made by either party is a reversible error.

There is no proof surcharging the county court settlement which in itself is *prima facie* evidence of its own correctness and the party

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assailing it must overcome by proof this presumption in its favor, without this the county court settlement can not be disturbed.

The simple dismissal absolutely of the case will be a bar as to all the subject matters in litigation and sufficient to prevent a re-litigation of the same causes though it would perhaps have been more formal to have confirmed the original partition still this is not a cause of reversal.

Wherefore the judgment is affirmed.

Judge Peters not sitting in this case.

Turner, for appellants.

Tenney, for appellees.

CHAS. ARBEGUST v. MARGARET ALVARY.**Husband and Wife—Abandonment by Wife.**

A wife has a right to refuse to continue to live with a husband who had taken up with another woman, holding her out to the world on some occasions as his wife, and with whom he publicly associated.

Same—Liability for Support—Notice to Third Party.

Notice by a husband that he would not be responsible for maintenance of his wife and child, who had refused to further associate with him, Held, to be insufficient, and could be disregarded by one to whom the wife applied for sustenance.

Same.

A husband is held liable for the support of his wife and family, where shown that the wife was without fault, she not having the means of an individual support.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

January 28, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

This action was prosecuted to recover from Arbegust for the board, lodging and clothing of his wife and infant child.

It is alleged that he abandoned his said wife and child, leaving them in the most destitute condition and that he utterly failed, neg-

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lected and refused to provide anything for their support and maintenance.

It is objected that the petition is insufficient inasmuch as it does not charge that the abandonment of the wife was without good or sufficient cause. If this be a defect it was not taken advantage of by demurrer, and it is cured by the answer. The appellant does not deny the separation, but pleads in justification thereof that his wife was responsible therefor, she having refused to share with him his room and bed, and in point of fact and law having previously abandoned him.

This plea raised the issue as to whether he had good cause to leave the house at which he had and his wife had previously resided, and to refuse longer to provide for her support.

It is unnecessary for this court to pass upon the questions of fact presented in the record. It is sufficient that the evidence is of that character which forbids the setting aside of the verdict of the jury, unless for errors of law committed upon the trial by the court below. It is insisted that said court erred in permitting evidence to go to the jury conducing to establish adulterous intercourse between the appellant and lewd women before and after the separation from his wife, as the same could not have been the cause of the separation, nor have operated as a justification of the wife, in the abandonment imputed to her. It seems that the immediate cause of the domestic difficulties between appellant and his wife was the discovery by her in his possession of a letter well calculated to excite in the mind of the wife suspicions as to the fidelity of the husband to his marriage vows, and in the angry controversy between them at the time the letter was discovered expressions fell from them both indicating that the suspicions of the wife had been aroused before that time. As these prior suspicions were important in so far as they accounted for the feeling exhibited by the wife on that occasion, it was competent to prove circumstances occurring before that time, affording grounds upon which such suspicions might well have been founded.

His subsequent intercourse with the woman, Jenny Goodposture, whom there is evidence conducing to show that he held out to the world on some occasions as his wife, and with whom he publicly associated, afforded a good and sufficient reason for the refusal of the wife to accept any offers he may have made after the original separation to take her back, and to provide for her and her child in the future.

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The action of the court in giving and refusing instructions seems to be unobjectionable. And whilst the learned counsel representing the appellant insists that under the law no recovery should have been had, he does not call our attention to either one of the instructions given as specifically objectionable nor does he insist that either of those refused, correctly embodied the law upon either of the material questions in issue.

The only other point necessary to be noticed is the legal effect of the notice given by Arbegust to the appellee forbidding her from affording shelter to, or having any transactions with his wife and child. From the evidence we are satisfied that neither the mother nor the child was able by their personal exertions to support themselves. It was the legal duty of the husband and father to provide for them, and if he failed to do so, without good cause as to the wife and in any event as to the child, the deserted wife and mother had the right to obtain for herself and her infant child shelter, sustenance and such reasonable comforts as they were entitled to have considering their station in life, and for this much at least the law will compel the derelict husband to pay. And further than this the wife, when thrown upon her own resources, had the right to obtain these necessities and comforts for herself and child, at the hands of the only person in the city of Louisville to whom she was related, and upon whom she had the slightest claim. Under the circumstances her sister's home was the proper place for her to live, and to drive her from the only shelter at which she had a welcome, would have been an act of cruelty upon the part of the husband, which the law will neither permit nor excuse.

The appellee, therefore, had the right to disregard the notice, and Arbegust can not escape legal responsibility for the support of his wife and child by reason thereof.

The question as to whether or not appellant abandoned his wife without good cause or whether she first abandoned him and as to what was a reasonable compensation to the appellee for the support of the wife and child were properly submitted to the jury, and as they heard and weighed all evidence in the case, and as there was no error in the action of the court below affecting the substantial rights of the appellant, we do not feel inclined to disturb their verdict.

Judgment affirmed.

Speed, for appellant.

Woolly, for appellee.

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J. C. ARNOLD *v.* THOS. WILLIAMS.**Bills and Notes—Pleading—Notice of Protest.**

An allegation in a petition on a protested bill, that "said parties to the same were duly advised of said acceptance being protested." Held, insufficient to state a cause of action under Civil Code, Sec. 118,—it being a conclusion of the pleader that the law had been complied with.

APPEAL FROM KENTON CIRCUIT COURT.

May 13, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The principal question in this case and the only one we need to decide, is as to the sufficiency of the petition, which was involved by the action of the circuit court in sustaining the demurrer to the answer of the appellant.

Due notice of the protest of the bill, which was the foundation of the action, was necessary to bind the appellant as endorsers.

The only allegation in the petition of this is that "said parties to the same were duly advised of said acceptance being protested."

Was that a sufficient averment of the essential fact that the notice required by law was given in proper time and in the manner necessary to bind the endorser of the bill? According to the rule that the plaintiff must state "facts constituting" his cause of action? (Civil Code, section 118.) We are of the opinion that the allegation stated does not with sufficient certainty impart a statement of facts from which the court could determine that notice of protest was given as the law required. The petition does not allege when, how, or by whom, the appellant was "*advised*" of the protest; and the statement, in effect, that he was duly advised of the fact, is but the pleader's conclusion that the law was complied with, without the disclosure of facts from which the court could judge whether it was or not.

The demurrer should therefore have been applied and sustained to the petition.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Carlisle, Foote, for appellant.

Rankin, for appellee.

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JOHN BURKS ET AL. v. ANDREW LANE.

Bills and Notes—Notice of Protest.

An irregularity, or laches, on the part of officers of a Bank, in forwarding a notice of protest, by an incorrect direction of the same, is cured by giving notice through the postoffice at which the payor usually receives his mail.

APPEAL FROM JEFFERSON CIRCUIT COURT. CHANCERY BRANCH.

January 24, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The only important question to be determined in this case is, whether there was due notice to the endorsers of the bill of its protest for non-payment. If there was irregularity, or *laches*, on the part of the officers of the bank in Louisville, in forwarding the notice to Burks, by an incorrect direction of the latter, the objection was, in our opinion, obviated by giving the notice also through the postoffice at Louisville, in which, it is proved, Burks kept a box, and was in the habit of receiving his mail.

We concur in the conclusion of the court of common pleas, and the judgment is therefore affirmed.

Sanders & Eastin, for appellants.

Hagan & Dupuy, for appellee.

THOS. D. BURFORD v. JANE B. BURFORD, ET AL.**Judicial Sale—Estoppel—Act of Claimant.**

Though a sheriff at a judicial sale, by reason of failure to enter proper credit of full payment made by judgment debtor, sold more land than necessary, the debtor, not using ordinary diligence for more than a year to discover this fact, induced defendant to purchase the land so sold from the assignee of the execution purchaser. Held, to estop plaintiff from asserting claim with or against such purchaser.

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APPEAL FROM MERCER CIRCUIT COURT.

May 12, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

We are of opinion that the sheriff should have allowed appellant interest on the \$2,000 payment made by him on the debt to the Ewings Institution from the date of the same up to the time when the debt fell due.

In consequence of his failure to do so he sold more land than the executions in his hands authorized him to sell, and his sale was void. But nearly a year after this sale was made, and when appellant either did know or could by the use of ordinary diligence have discovered this fact, he induced the appellee to purchase the land so sold from the assignee of the execution purchaser.

This conduct upon his part stops him from asserting with or against her. The circuit judge therefore properly dismissed his petition.

Judgment affirmed.

J. and P. B. Thompson, for appellant.

Polk, Kyle, for appellees.

R. BELL & OTHERS v. JAMES SANDERS' ADMR. & OTHERS.

Pleading—Filing Answer After Pro Confesso—Discretion of Court.

The refusal of the court to permit the filing of an answer at a succeeding term of court after a pro confesso had been permitted, is not an abuse of discretion to authorize a reversal.

Vendor and Purchaser—Evidence of Title.

Evidence examined, and held to justify the judgment of the lower court passing title to land in controversy.

APPEAL FROM MARION CIRCUIT COURT.

January 6, 1871.

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OPINION OF THE COURT BY JUDGE LINDSAY:

The refusal of the court to permit appellants, Graham, Armstrong, and Bell to file their joint answer at the succeeding term of the court after they had permitted the petition to be taken for confessed or to them, was not such an abuse of discretion as will authorize this court, for that fact alone, to reverse the judgment; more especially as said judgment is not based upon the confession, but upon the merits of the controversy tried upon the issues raised by the answer of the guardian *ad litem* for the infant heirs of Bryers. The sole question we can consider is whether the written evidence of title produced by the appellees and which seem to have been read without objection, when considered in connection with the depositions in the cause, are sufficient to establish that the legal title to the land sold to Graham and Ryers is in either the Sanders' heirs or Benjamin Logan. The original papers which were destroyed when the clerk's office was burned, were seen and examined by Mr. Fogle, one of the attorneys for the appellants, and he states that from their appearance they were of the age they purported to be.

The bond from Loving, the original patentee of the land to Reed, agreeing to convey to him in fee simple one-half of two tracts, of land, one of which was the survey in question purports to have been executed on the 16th of October, 1873. The assignment from Reed to Knox bears date February 22, 1812, and the conveyance from Knox to Logan was executed March 1st, 1816. The antiquity of these papers, coupled with their appearance of genuineness is enough to establish *prima facie* that they are authentic. This presumption is strengthened by the fact that though more than eighty years have intervened since the assignment to Reed by Loving, neither the heirs nor assigns of the latter so far as it appears from this record, have ever omitted claim to the land. In addition to this it appears that for more than twenty years the parties of the survey claimed by Logan, which embraces the land sold to Graham and Byers, has been defined by marked boundaries, and recognized by those living in its vicinity as his land.

The conveyance by Knox to Logan in our opinion invested the latter with the legal title to the land, and he still holds it notwithstanding the subsequent assignment of the bond of Loving

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to Knight; this only invested Knight with an equity which passed back to Logan when Knight reassigned to him.

We are of opinion that the judgment of the court below passes the legal title of the land for which the notes sued were executed, to Armstrong and the heirs of Byers, and as they are entitled only to a conveyance with special warranty it can not matter to them through what channel the legal title reaches them.

Perceiving no available error in the judgment appealed from, it must be affirmed.

R. & F. for appellants.

Wheat, for appellees.

R. F. ALLEN & SAML. ALLEN v. T. J. SPIDWELL.

Trial—Assault and Battery—Concluding Argument by Attorney—Burden of Proof.

An answer to an action for assault admitted the same, but justified it upon the ground that it was done in defense of his son, who had been assaulted by plaintiff. Held, that as the defendant had the burden of proof, he was entitled to the concluding argument to the jury.

APPEAL FROM MCCracken CIRCUIT COURT.

May 13, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

No objections were made, and no exceptions were taken to the instructions given to the jury, and while we might regard the verdict against appellant as high, we would not feel authorized on that account to reverse the judgment of the court below and award a new trial.

The only question to be considered, then, is whether the court below erred in refusing to permit the attorney of appellant, R. E. Allen, to conclude the argument to the jury.

Samuel Allen put in no defense to the action, and as to him the jury had nothing to do but to inquire of damages.

R. E. Allen in his answer admitted the assault and battery alleged against him, but justified upon the ground that he did

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it in the defense of his son, who was assaulted by appellee, and was in danger of death, or great bodily harm.

By sub-section 6 of section 347, C. C., it is declared that the party having the burden of proof, shall have the conclusion of the argument to the jury.

Upon the pleadings the plaintiff below was entitled to a judgment without the introduction of any evidence, and might introduce it to show the extent of the injury received by him to increase the damages, but the burden of proof was evidently on the appellant and that entitled him to the conclusion of the argument before the jury.

And for the error of the court below in refusing him upon his motion to conclude the argument to the jury the judgment must be *reversed*, and the cause remanded for a new trial and for further proceedings consistent herewith.

L. D. Husbands, for appellants.

Bigger & Moss, for appellee.

GEO. D. ALLEN v. JAS. F. VAUGHN.**Appeals—Bill of Exceptions—Filing by Consent.**

After a new trial had been refused, upon motion, two weeks time was given to file a bill of exceptions. Held, that the filing of same in three weeks, in the clerk's office by consent, is not evidence that the Appellate Court can take cognizance of.

APPEAL FROM JEFFERSON CIRCUIT COURT.

January 19, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

After judgment had been rendered against appellant, a motion was made by his attorney for a new trial, which was not disposed of until the 2nd of April, 1870, when it was overruled, to which appellant excepted—and *two weeks time* was then given to prepare and file a bill of exceptions, although all the evidence except that of one witness in the case *was* depositions.

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But instead of presenting and filling the bill of exceptions in court within the time allowed—and having the filing of it entered on the record, and thereby making it a part of the record, it was handed to the clerk in his office on the 21st of April, 1870, nearly a week after the time for filing it as fixed by the court had expired, and he then says it was filed in office by consent, which is no evidence that this court can take judicial cognizance of, that it was filed at all.

We are therefore constrained to disregard the paper purporting to be a bill of exceptions, and in the absence of the evidence, and of anything appearing to the contrary we must presume the judgment of the court is correct. As to the bill of exceptions see *Tweedy vs. Commonwealth*, 2 Met. 379. *Vandever vs. Griffith*, *Ib.* 425. *Foreman vs. Brenham*, (17 B. Mon. 607.)

Wherefore the judgment must be affirmed.

Twyman, for appellant.

Brown, for appellee.

 S. E. BOSTICK v. WM. LINDSAY.

Bills and Notes—Consideration Parol Evidence.

The consideration in a note not being expressed, it is permissible to allege and prove by parol that it was executed and delivered for no good and valuable consideration.

APPEAL FROM GRAVES C. P. COURT.

February 12, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

The consideration of the note to Binford not being expressed, it was permissible for the appellant to allege and prove by parol, facts showing that he executed and delivered it for no good and valuable consideration; and we regard the facts alleged in the answer, in substance and effect, that the defendant being in possession of the horse as one of Binford's company to whom that horse and others impressed for the use of Confederate soldiers, had been turned over by Kendrick, the impressing officer, gave

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Binford the note for the purchase, only of indemnifying him against loss on account of his supposed responsibility to the Confederate Government, which had ceased to exist, without any loss or injury occurred to Binford, on account of the retention or possession of the horse by defendant, a sufficient impeachment of the consideration of the note, and, if true, a valid defense to the action.

It results, therefore, that the court erred in sustaining the demurrer to the answer.

Wherefore the judgment is reversed and the cause remanded with instructions to overrule the demurrer and for further proceedings consistent with this opinion.

Judge LINDSAY not sitting.

Boon, for appellant.

JOHN FENNESSEY v. EDWD. F. ABBOTT.

Covenant—Seizure—Warranty—Deeds.

A deed reading, "covenanting with the grantee, his heirs and assigns, that the title so conveyed is clear, free and unincumbered," and "that he will warrant and defend the same against all legal claims whatsoever," held, to mean first, a covenant of seizure, and the second, a covenant of general warranty.

Same—Breach of Covenant of Seizen—Damages.

An allegation and proof that one half the land so conveyed belonged to a third party, and that this title was not in the vendor at the date of the conveyance, was at once a breach of the covenant of seizen, and damages for that part could be recovered.

Same—Criterion of Damages.

The criterion of damages would be the one-half of the amount paid for the lot, with interest, the taxes paid on the property, and expenses of recording.

Same—Equity—Rescission.

A rescission under such a deed could only be asked for in an equitable action, and not in a suit at law for damages.

APPEAL FROM KENTON CIRCUIT COURT.

January 19, 1872.

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OPINION OF THE COURT BY JUDGE LINDSAY:

The claims setting out the covenants as to title contained in the deed from Fennessey to Abbott is in these words:

"To have and to hold the same to the said Abbott, his heirs and assigns forever the grantor, his heirs, executors and administrators hereby covenanting with the grantee, his heirs and assigns, that the title so conveyed is clear, free and unencumbered, and that he will warrant and defend the same against all legal claims whatsoever."

We are inclined to the opinion that this clause embraces two distinct covenants; the first a covenant of seizin and the other an ordinary covenant of general warranty.

To constitute a breach of the latter there must be an eviction of the grantee by a paramount title, but the covenant of seizin was broken at once if the title conveyed was not "clear, free and unencumbered."

Appellee, in his petition alleges that an undivided one-half of the lot conveyed belongs to one Hattie Powell and that the title thereto was not in the appellant at the time the conveyance was made.

If such be the case, the covenant of seizin was broken at once, and the appellee had the right to recover the actual damages sustained by reason of the defect in the title conveyed to him so far as the interest owned by Miss Powell is concerned.

To recover damages this action at law was instituted, and with the petition the appellee tendered a deed to appellant conveying the entire lot back to him.

Upon hearing the circuit judge to whom the law and facts of the case were submitted rendered judgment against appellant for the sum of \$997, with interest from the date thereof. It appears from the face of the judgment that this amount comprised the original consideration paid for the entire lot (\$750) with interest, and the taxes paid on the lot by appellee while in his possession.

Appellee fixed as the measure of his damages the consideration paid for the lot with interest, and the taxes paid on the property, and expenses incurred in stamping and recording the conveyances. The circuit judge did not err to his prejudice in accepting this as the criterion of recovery, but did err in adjudging to him in this action, the entire purchase price, interest,

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expenses and taxes. His title being defective as to one-half of the property, and perfect as to the remainder, he should only recover damages for that portion to which his title is not "clear and unencumbered," in an action at law for a breach of the covenant of seizin. According to the standard of recovery fixed by him in his petition his judgment is for double as much as it should have been.

If he desires to rescind the contract of sale he must resort to his appropriate action in equity. A rescission can not be had in such a proceeding as this. The circuit court could not compel the appellant to accept the conveyance tendered him with appellee's petition and did not attempt to do so. It does not appear that appellant did accept the tendered conveyance, and it may be possible, that when the proper proceedings for a rescission of the contract are instituted that he will be able to show that he should not be compelled to refund the consideration in money.

For these reasons the judgment is reversed and the cause remanded for further proceedings consistent with the principles herein expressed.

R. Richardson, for appellant.

Benton, for appellee.

H. D. FRISBEE v. JNO. T. WALL, & CO.**Trespass—Damages—Possession as a Trespass.**

Where a railroad company claimed land in controversy, as a part of its depot grounds, and under such claim was actually, at the time the fence was erected, applying the grounds to the general uses and purposes of a depot, this in law amounted to such a possession as would prevent a recovery for trespass.

APPEAL FROM HARRISON CIRCUIT COURT.

January 24, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The verdict for four hundred dollars in damages for the trifling trespass complained of, is so excessive as to make it

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appear that the jury were influenced by passion or prejudice. The remission of all the damages except twenty-five dollars did not authorize the court to refuse the motion for a new trial.

Had the jury been free from the influence of passion or prejudice, the verdict might possibly have been in favor of appellant.

In any event appellant is entitled to have a verdict from an impartial and unprejudiced jury. Instruction No. 3 asked for by appellant is not so carefully worded as it might have been, but the principle of law embodied in it, is correct.

If appellant had the actual possession of the land in controversy, he could not have been guilty of trespass in removing the fence. Possession of real estate is a mixed question of law and fact. Appellant had the right to ask the court to define what, in law, constituted actual possession of land, a portion of which was unenclosed.

If the railroad company claimed the land in controversy as part of its depot grounds, and under such claim was at the time the fence was erected, actually applying it to all the uses and purposes to which depot grounds are usually applied, this in law amounted to such a possession as would prevent a recovery in this action, and the jury should have been so instructed.

Instruction No. 4 was properly refused. It attaches too much importance to the construction of the road to the entrance of the cattle pen.

For the reasons pointed out the judgment is reversed and the cause remanded for a new trial.

W. W. Trimble, A. H. Ward, for appellant.

J. S. Boyd, W. S. Wall, for appellees.

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R. E. EDWARDS v. WM. GRAVES, &CO.

Mortgages—Priority—Lien of Heirs in Estate—Estates.

A mortgagee can acquire no greater right by his mortgage and foreclosure than the mortgagor had, and a sale under the mortgage will not affect the right of distributees to a recovery out of the land of over plus paid to the mortgagor through a mistake of the commissioner, as his distributable portion.

Same.

The purchaser at the mortgage sale acquired no title, legal or equitable, as would deprive the distributees of their right to enforce against the mortgaged property their judgment obtained to recover back the overplus paid the mortgagor by the mistake of the commissioner.

Same—Lis Pendens.

The doctrine of lis pendens would not apply in favor of the mortgagee, as he could claim no greater title than the mortgagor had.

APPEAL FROM TAYLOR CIRCUIT COURT.

January 12, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The petition in equity instituted by the children of F. Graves, deceased, against his administrator was pending in the Taylor circuit court at the time of the purchase by the appellant Edwards, of the land in Green county sold under the judgment in favor of Naylewood against L. C. Graves.

The object of the suit in Taylor county was for a settlement of the estate of F. Graham, deceased, and a division and distribution of his whole estate including lands and personalty between his children.

This suit was instituted in June, 1862, and was prosecuted with as much diligence as usually pertains to the conduct of such causes. It seems that the heirs of Graves all agreed in writing that their three uncles should divide their estate between them, and in making the division they were all to be made equal, the

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one with the other, as advancement had been made to some of the children by their father.

In the division, the land was allotted to I. C. Graves and L. N. Graves and their two sons by reason of their taking the land because largely indebted to the other children. I. C. Graves failing to pay the amount he was required to pay under the division made by the uncles and the suit still pending for the settlement of the estate, in the hands of the administrator, the case was referred to a commissioner to ascertain and report the amount that would be due by I. C. Graves in the final distribution between the children. The commissioner reported the indebtedness of I. C. Graves at \$516.54 cents and upon his failure to pay the same a judgment was rendered directing the commissioner to sell the land allotted him, to pay the same. A part of the land was sold and the appellant, Edwards, became the purchaser, and the report of sale was confirmed.

I. C. Graves had mortgaged a part of this land allotted him in the division to one Alfred Naylewood—this tract contained three hundred acres and was located in the county of Green. Naylewood filed his petition to foreclose this mortgage and obtained a judgment. This tract of land was sold, and the appellant became the purchaser. The heirs of Graves were not parties to the suit of Naylewood.

After the purchase of this land by the appellant, Edwards, the children of Mrs. Gains, who was a child of F. Graves, deceased, having died during the pendency of the suit for the settlement of the estate were made parties to the action, and by their guardian ad litem, filed an answer and cross petition, in which they allege a mistake in the settlement of the estate of their grandfather, by which I. C. Graves is charged with about three hundred and fifty-eight dollars less than he should have been charged by the commissioner in his report. They also file an amended or supplemental petition, in which is united the other heirs as plaintiffs, making the appellant, Edwards, a party, alleging that he has purchased the land and claiming that they have a lien upon it for the amount yet unpaid by I. C. Graves and found due by him upon the commissioner's report, to whom was referred the settlement of the accounts to see if a mistake had been made by the former commissioner. The mistake as reported and which appears from the record is \$358.32—a judgment was rendered by the court below in favor of the children

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of Graves, subjecting the land bought by Edwards to the payment of this debt and of which he is now complaining.

The purchase by the appellant of the land in Green county under the decretal sale passed no such title, legal or equitable to him, as would deprive the appellees of the right to enforce their judgment by selling it; they were no parties to the suit brought by Naylewood against I. C. Graves and were not estopped by that judgment from asserting their claim against this land. The original suit for a settlement and division of the estate had been pending for three or four years and perhaps longer in the county of Taylor. I. C. Graves had obtained in land his full part of the estate, with the incumbrance upon it, of the money he was owing the other children to make them equal with him by reason of his having been allotted this land. They had a lien upon it for this amount until it was fully satisfied, or a conveyance by them releasing it. A lien is required by the statute to be retained in the deed when the legal title passes, but in this case the legal title had never passed out of their children and is still in them so far as this record shows. The chancellor will not divest them of this title unless their debt is paid. They have not only an equity equal to the appellant but have the legal title itself.

The doctrine of *lis pendens*, or the law applicable to liens, can not be made to apply to this case, for the reason that the mortgage of the land in Green acquired no greater or better title than the mortgager had. The mortgager, I. C. Graves, was not vested with the legal title to the land; he had no right to demand this title until he had paid for the land. The suit pending in Taylor had never progressed to a final termination. It is true that an order made in the case shows that the case is stricken from the docket, but the very next day after the order was made, the amended and cross petition of the infants is filed and the case has progressed as if the order had never been made.

If the case had never been filed away, the chancellor would not have compelled these appellees upon a petition for a new trial in the nature of a bill of review, showing the mistake of the parties and the commissioner in making the settlement, to have parted with the legal title without having their money paid them. It appears that some of the appellees and particularly the children of Mrs. Gains, have been fully paid, but this judgment

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on the supplemental petition is nevertheless proper—the only error is that I. C. Graves was not required to pay the money directly to the party entitled to recover it. Some of the children have received more money than they were entitled to and those paying it are seeking to recover it back, and I. C. Graves having received more than his proportion must be required to refund also. Neither Graves nor his vendee, Edwards, can complain in this case.

Judgment affirmed.

Chelf, for appellant.

W. Howell, for appellees.

B. P. GORHAM & WIFE v. S. R. BETTS.**Guardian and Ward—Settlement—Dereliction of Duty—Costs.**

A father was appointed guardian for his daughter. After a long period of time, during which only one settlement was made, the guardian filed suit to settle the account, for the reason that his ward refused to settle with him. Held, not to justify the entering of costs as against the ward, by reason of the dereliction of the guardian.

Same—Necessaries Furnished—Duties of Parents.

A parent, who is guardian of his only child, cannot be allowed to charge large sums out of the estate of his ward for her clothing, schooling, etc., so as to practically liquidate the estate in his hands.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 10, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The record in this case shows that the appellee was appointed trustee and guardian for his daughter more than twenty years previous to the institution of this suit. He has made only one or two settlements of his accounts as guardian, and by the present suit in equity against the appellants, his daughter and her husband, is seeking the aid of the chancellor for the settlement of his accounts, for the alleged reason that the appellants refuse to settle with him.

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The long period of time intervening between the qualification of the appellee as guardian and the filing of this suit has afforded him ample opportunities to settle his accounts with the county commissioner, or county judge of his county as the law requires. If he had settled his accounts once in every two years there would have been no necessity for an accumulation of costs, and an expenditure of money such as must result from a settlement of his accounts in a court of equity.

After referring the case to the commissioner (and allowing to the appellee, who is the father and natural guardian of the appellant, Mrs. Gorham, and bound in law to provide and maintain her during her minority, or at least until she was able to maintain herself), large sums of money for clothing, schooling, etc., the ward is brought in debt to the appellee in the sum of \$88. The court had no right to charge the estate of Mrs. Gorham with the expense incurred, for her maintenance and education. A case might occur where the estate of the child was ample for its support and the father being poor and unable to provide for the child, that the chancellor would require and authorize such expenditure out of the child's property, but no such state of case is made to appear in this record.

These allowances should have been respected by the court below, and the appellee left without a settlement except for the benefit of the ward. A proper investigation of the accounts, between these parties, and excluding from the settlement the accounts where the interest is more than double the amount of the principal would result in a judgment for the appellants.

The judgment of the court below is reversed, and the cause remanded with directions to dismiss the appellee's petition.

Breckinridge & Buckner, for appellants.

Polk, for appellee.

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G. W. GRIMES v. J. F. GRIMES.

Pleading—Answer to Make Specific Denial.

A petition alleges that A. paid to B. on ———, \$500.00 to be credited on a note, which the holder agreed and promised to enter on said note, but had failed to do so. The answer states that after the agreed settlement, on ———, etc., no payments were made by the payor to the payee. Held, not to be a denial of the specific charge in the petition.

APPEAL FROM FAYETTE CIRCUIT COURT.

December 21, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The allegation is explicitly made in the petition that before appellant assigned the note for \$4,200 to Hanna that appellee paid to appellant on the ——— day of February, 1866, on Cheapside, in Lexington, \$500 to be credited on said note of \$4,200, and which credit appellant agreed, and promised to enter on said note; but had failed to do.

This specific allegation of the payment with time and place is not replied to in the answer. It is true that in general terms appellant says that after the settlement in Kincead's office in January, 1866, no *payments were* made by appellee to appellant. And then presents an agreement to show that from the recent assignment of the note after the settlement in January, 1866, to Hanna, and the opportunities appellee had to present his claim for the credit before the judgment for the sale of the land was rendered, create a strong presumption against his claim. The force of that argument can not be denied. But it would have been much stronger if appellant had directly responded to, and denied the charge of the payment of any money at the time and place designated in the petition, or at any other time and place subsequent to the settlement in January, 1866, and for which appellee had not been credited.

But even waiving the consideration of the insufficiency of the answer, the payment of the \$500 is established by the evidence of Adams and Goodloe. When told by appellee in presence of

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these witnesses that he had received the \$500 as a payment for the land at the time and place named in the petition, appellant admitted he got the money, but said it was credited on the other note, in which it seems he was mistaken.

A different conclusion from the circuit judge is not authorized by the pleadings and proof in this case.

Wherefore the judgment is affirmed.

Breckinridge & Buckner, for appellant.

Huston & Mulligan, for appellee.

SARAH F. EDINGTON v. WM. M. EDINGTON.**Deeds—Trusts Created.**

A recital in a deed, which is in fee simple, that the consideration of \$1,700.00 of the money for the land was an advancement, held not evidence sufficient to create a trust in the land, or the money, for the benefit of the wife of the vendee.

APPEAL FROM TAYLOR CIRCUIT COURT.

February 21, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The conveyance of the land in controversy, was made by Robinson, the father of Mrs. Edington, and passed to the grantee, Wm. Edington, the absolute fee simple title—the deed reciting that seventeen hundred dollars of the money for the land was an advancement, is not evidence sufficient to create a trust in the land, or the money for the benefit of the wife, Edington being the son-in-law, Robinson saw proper to make to him this conveyance, without any conditions trusting to his, Edington's, ability to take care of and maintain his family. There was nothing in the deed creating any trust for the wife. The cases referred to by counsel for the appellant are not applicable to such a case as this. That the wife is entitled to a settlement out of the personal estate derived by descent or derived from her

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father before it gets into the husband's possession is too well settled to question.

And if a deed is made to the husband for land by the father-in-law reciting the consideration as being an advancement to the wife or daughter, a trust will ensue to the benefit of the wife. In the case of *Pierce vs. Pierce*, 7 Ben. Monroe, page 436, relied on by counsel in this case the case recites the fact "that one thousand dollars of the amount was presented to Mrs. Pierce" and in that case this court says "that if a deed had been made reciting the fact that \$1,000 of the consideration had been paid by Mr. Pierce from money presented by her father, or even receipted for by the husband as being a gift to the wife, that this recital would create an interest in the wife. In the present case there is an absence of any such recitals or the use of any language whatever, showing that the grantee intended to give to the daughter an interest in this land. He had the right to make an advancement to his son-in-law and the absolute conveyance *evidences* that to have been his intention.

There is no allegation of any mistake in the conveyance and no proof in the whole case showing an intention upon the part of the grantor to convey the land in any other manner than appears from the deed itself.

The gift by the husband to the *wife* of the five hundred dollars passed no right to her as against the creditors of her husband. The wife must account for it except the amount expended by her for funeral expenses, &c., for which she has been credited by the court in the judgment rendered.

Judgment affirmed.

Montague, D. G. Nutchell, for appellant.

Harrison, Robinson, for appellee.

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JNO. T. ELDER & OTHERS v. SISTERS OF LORETTO.

Descent and Distribution—Education of Children—Devisees.

A testator devised his estate to his wife in trust for herself and children. One of the children devised her share to a society. Held, that the mother would be entitled to use the proceeds of the estate and portions of same, if necessary, to the education and maintenance of the children, and the society could only come in for their share of the residue.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT.

January 31, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:.

Carter at his death left an estate valued at about six thousand dollars. By his will the property was held by his wife in trust for herself and children during her widowhood—she never married. Her daughter, Modista Jane Carter, died before the mother, leaving a will by which she devised her estate to a society called the *Sisters of Loretto*. Mrs. Carter, after the death of her husband, seems to have managed the estate left her with much judgment and economy and not only maintained her children, eight in number, well, but gave them good education. She seems to have accumulated some money by selling her husband's lands and a part of the negroes, and a part of this money was applied to the purchase of a small farm, and the proceeds of which is the subject of this controversy.

After her death this farm purchased by her was sold upon the petition of all her children as well as the Sisters of Loretto, whose claim to an interest in this land must then have been recognized by the appellants. After the sale, however, the appellants refused to permit the appellees to share in any part of the estate left by Mrs. Carter upon the assumption that it was her, Mrs. Carter's, estate, and not that devised to her in trust by her husband or its proceeds.

The original suits brought by the appellees are based upon the idea that it was Mrs. Carter's own estate, but by amended plead-

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ings they charge that it was the estate devised in trust by the husband or the proceeds of that estate.

The children of Carter, who must have known all about the manner of holding this property, united with them as plaintiffs, the Sisters of Loretto, in a petition for the sale of the mother's land. It was evidently done for the reason that they regarded them as interested in the property by reason of the will of their deceased sister. The proof shows, however, that the mother expended much of the proceeds of the sale of the property in the education of her children. The daughter, Modesta, had united herself with the Sisters of Loretto and so far as appears from the record contributed nothing in aiding to accumulate the means out of which the family were supported and the children educated.

The land owned by the father was sold for only seven hundred and fifty dollars, all the slaves were emancipated except one that had been sold for \$1,000. The father of Mrs. Carter gave her six hundred dollars and this money was doubtless invested in the land. She could not have educated her daughters as she did at boarding school, clothe and support herself and eight children upon this small estate, and then have much surplus left of the annual profits. The proof tends to show also that her daughter, Modista, had received more than the other children and whether she did or not she certainly never contributed in any way to aid in the accumulation of the estate.

This fund the mother derived from her father ought not to be given to those who were entire strangers to her, and had no claims whatever on her bounty. The six hundred dollars paid by the mother should be first deducted from the gross amount as fixed by the chancellor, viz., the sale bonds at the date of maturity, and then a judgment in favor of the appellees for their interest in the remainder of the purchase money. This will reduce the amount of damages also on the dissolution of the injunction to the extent that judgment is reversed.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Walker, Sweeney & Stuart, for appellants.

Kincheloe & Eskridge, for appellees.

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JOS. L. FRANCIS & WIFE v. RICE G. WOODS, &c.

Fraud—Collateral Attack—Former Judgment.

Though fraud and collusion in a petition be admitted as true, a defendant cannot attack collaterally a judgment rendered 26 years before, especially as she did not avail herself of the provisions of Civil Code, Sec. 421, and Sec. 579, Sub. 8.

APPEAL FROM GARRARD CIRCUIT COURT.

March 20, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The frauds and forgeries which the appellants allege were committed by Bridges, are charged to have constituted the grounds of the proceedings which resulted in the judgment under which Woods holds title to the land in controversy.

It is not directly alleged that any improper practices were resorted to by Bridges touching the proceedings in court, by or through which the appellant's administrator or her guardian ad litem were overreached or misled, or the court imposed upon.

The alleged falsehoods contained in the pleadings and the fabricated exhibits by which they were sustained were matters which were directly put in issue in such suit, and can not in a collateral proceeding be relied upon as sufficient grounds for treating a judgment rendered nearly twenty-six years before this suit was instituted as an absolute nullity.

It is alleged that the whole record in the case of Mary S. Kennedy vs. W. A. Bridges is false and fraudulent from beginning to end, but from this general and indefinite charge it can not be implied that the falsehoods and frauds were practiced in obtaining the judgment by imposing upon the court or misleading the parties.

The charges set up in the pleadings in this case if true, would have been available for a vacation of the judgment in the case of Kennedy vs. Bridges. If Mrs. Francis had seen proper, within twelve months after she became twenty-one years of age to have filed her petition in the proper court, and asked such relief,

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Civil Code, Section 421, subsec. 8, Section 579. This she failed to do, hence such judgment remains in full force and effect.

Admitting everything in her pleadings to be true, still no court in this State has the right to treat it as void, nor has the Garrard circuit court the power to vacate or modify it.

Appellees' demurrers were properly sustained, and appellants failing to amend further the circuit court did not err in dismissing their petition.

Judgment affirmed.

Judge PETERS did not sit in this case.

Bradley, for appellants.

Dunlap, A. Harding, for appellees.

A. D. GEOGHEGAN v. MICHAEL MILLER'S ADMR.

Judgment—Defense to Action, After Rendered.

A defendant cannot by answer, after a judgment has been rendered on a note, plead set-offs and payments on a note, the judgment not thus being subject to a collateral attack.

APPEAL FROM MEADE CIRCUIT COURT.

April 24, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The note upon which the judgment now complained of was rendered bears date August 8th, or 5th, 1850. Suit was brought upon it the 23rd of June, 1858. On the 24th of April, 1865, judgment was rendered for the amount, credited by the payments endorsed on the note. Up to that period no answer had been filed—nor was any answer filed till the 26th of April, 1866, nearly eight years after a summons was served on appellant.

Of the demands pleaded as an offset against the judgment it is proved that of the execution No. 2622 it was satisfied as early as May, 1848, and of the one numbered 2623 all of the principal of that debt was made by a sale of the property of Miller at the same time except \$21.02 principal, with some interest and costs; for that balance an execution issued on the 4th of June,

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1850, directed to the sheriff of Meade county—the county in which the defendant therein lived—that execution has never been returned, and none other has since ever issued.

Of the judgment in favor of R. D. Geoghegan and claimed to have been assigned to appellant, an execution issued on it on the 28th of January, 1851, which has never been returned. See Brown's statement in the record, former clerk of Hardin circuit court—proved to be correct by Stone.

It appears that after the last execution had been issued for a small balance on one of the debts now claimed to be unpaid, appellant executed the note sued on—and then delayed for about sixteen years to claim a credit for what he now says is unpaid, and does not make an effort to explain the cause of the delay, nor to rebut the presumption of a satisfaction of all previous demands by the execution of the note sued on.

These unanswered facts were not stated in the opinion, as it was then supposed that it was not necessary to comment specially on them as another reason might be assigned for an *affirmance*. But a petition for a re-hearing rendered this necessary.

No reason is offered why these demands were not relied on before the judgment was rendered, having waited until after that was done, although appellant had the opportunity to make his defense he can not after judgment, in this way open a litigation which has been closed.

Petition overruled.

Cofer, for appellant.

Marriott, for appellee.

JEFF BROWNFIELD v. D. S. HOWELL'S EXECUTRIX, &C.**Attachment—Acts Constituting Valid One.**

In an action against a corporation, by injunction, an attachment of all choses in action, franchises, money on hand, served on the President and Treasurer of said corporation, a prior lien is obtained over a fund, owing by a third party, not made a party to the suit, but whom the defendant admitted was indebted to them, this amount by the answer of the debtor was paid in by a verbal order five days before the suit was filed. Such an attachment would be prior to a creditor who subsequently attached the fund, by serving the debtor with due process.

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Same.

An allegation in the answer of the creditor that he is advised and believes that no valid or effectual attachment had been levied on the debt in controversy, not sufficient to overthrow the *lis pendens* by a prior suit, being a seizure of all the assets, choses in action, moneys, etc.

APPEAL FROM NELSON CIRCUIT COURT.

December 16, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

Appellee as executrix of of Daniel S. Howell, deceased, being a judgment creditor with an execution and a return of *nulla bona* of The Bardstown and Green River Turnpike Road Company, on the 30th of July, 1858, filed her petition in the court below against said turnpike road company and others, alleging the foregoing facts and the amount of its indebtedness to her, which is several thousand dollars, that it had under its charter made a turnpike road, beginning in the county of Nelson, and continuing it through several other counties, had erected gates at various and proper places on said road, in the several counties through which it was constructed, at which tolls were collected, that said company owns no other property to her knowledge except, said turnpike road, and its franchises, *choses in action*, money on hand, &c., none of which can be reached by an ordinary execution, that William Southerland is the president, and E. B. Smith, the treasurer, of said company, and the last named person is authorized by law to collect from the several gate keepers on said road, the tolls received by them, and she prays that said turnpike road company, and Smith, its treasurer, whom she makes defendants may be compelled to answer her petition, and to set forth all the choses in action, money and other property of said corporation that may be in their possession, or under their control, and that the same may be attached, and by the appropriate judgment applied to the satisfaction of her debt. She also prayed, that said corporation should be required by proper orders, and judgments of the courts, to collect all tolls, to which it might be entitled, and hold the same subject to the further orders of the court, that it should by its officers, and agents, at each term of the court, report the various sums collected, and that the same should be applied to the extinguishment of her

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debt, and if by that means the same could not be paid, then she prayed that the road, its franchises, etc., should be sold and the proceeds thereof paid over to her.

On the 31st of July, 1858, the following order was made in the case by P. B. Muer, circuit judge: "The defendants are ordered to discover all the money, choses in action, and other property, and estate of said corporation, and the same is attached, and to be held subject to the further order of the court in this cause. And the defendants are enjoined and commanded to *exercise* the franchise granted them by the charter, by collecting, and demanding the tolls, which they are authorized to collect for the use of the road in the petition mentioned, and to hold the same, and to report the same to this court on the first day of each term till this suit is disposed of; but the defendants may, out of said tolls, pay such sums as may be necessary to repair the road and to pay the gate keepers, and all the necessary expenses of collecting said tolls; the plaintiff first to give bond in the penalty of \$500, to pay all costs, and damages occasioned by this order if found wrongful, with security to be approved by the clerk, and he will endorse the process accordingly."

The bond as required in said order, was executed, and the summons issued with the order indorsed, and executed on the treasurer of said corporation on the 4th and on its president on the 9th of August, 1858.

The corporation by its president filed an answer on the 29th of September, 1858, admitting its indebtedness to appellee, setting forth the names of quite a number of other persons as its creditors, alleging that its gate No. 5 had been given up to, and the tolls collected there, set apart for the payment of appellant, who is named as a creditor in the answer, and also alleging that Carter & Thomas were indebted for passing their stage coaches over said road to a considerable amount; but they were not formally made defendants to appellee's suit.

On the 2nd of April, 1861, appellee, the executrix of Howell, filed an amended petition, in which she made appellant a defendant to her suit, and charged amongst other things, that by an unauthorized and unlawful agreement between him and Southerland, the president of said corporation, the control of Gate No. 5 on its road, had been given up to appellant, and the tolls received at that gate transferred to him, all of which he had collected, and appropriated, which tolls amounted to large

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sums, and she prayed for an account thereof. On that amended petition a summons was issued, and executed on appellant on *July 2nd, 1861*. Carter & Thomas were also made defendants to her suit, and were served with process.

June 5th, 1862, appellant filed his answer, in which he stated, that the turnpike road company was indebted to him as shown by a writing signed by Southerland, its president, which writing he *filed*, and which was endorsed with the several payments made to him, the last of which he alleges was made "*on the 25th day of July, 1858*, being six days before appellee filed her original petition *with injunction*."

And in a subsequent part of this answer after asserting that the assignment to him of the tolls which were received at said gate, was for the purpose of liquidating a debt justly due him by the company, and that it was done in good faith, he alleges that he had another besides the one for the payment of which the proceeds of Gate No. 5 were assigned to him, against said corporation, on which he had instituted an action, recovered a judgment, and had an execution, and a return of *nulla bona*, that he then instituted a suit in equity against said corporation and others in the court below, to enable him to collect said judgment which suit was pending when he filed his answer, and which he referred to, and made a part of the suit of appellee, Howell, against said company and others.

In that suit, he alleged that Carter & Thomas were indebted to said corporation in the sum of \$400, and made them defendants, attached the amount owing by them to said corporation, and had the summons with the order of attachment served on Carter & Thomas; they came in court, admitted an indebtedness of \$408 to the road company and paid that sum into the court. But in their answer to his petition they state that before the attachment of appellant was served on them, they had given to the president of the Bardstown and Green River Turnpike Road Company a verbal order for the money on E. B. Smith, the treasurer of said company, but that its president had not received the money from said Smith, treasurer as aforesaid, when the attachment of appellant was served on them; that they then drew the money from the treasurer and paid the same into court, subject to its future order—this answer was filed the *28th of March, 1860*.

In the same case on the *3rd of October, 1860*, on motion of appellant, an order was made referring it to E. E. McKay as

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the court's commissioner, to ascertain what was the true amount of said Carter & Thomas' indebtedness to said turnpike road company, at the institution of his said suit, also of that of Turner Willson vs. Same and those of Foreman, and of Howell's Executrix vs. Same, and to ascertain and report other matters; from the last named period until *June 28th, 1866*; it does not appear that any other order was made in the case, on the last day, a judgment was rendered, directing the money paid into court by Thomas & Carter as aforesaid, to be paid over to appellant.

At the October term of 1865, of the Nelson circuit court, the venue in the cases of Howell's Exrx. vs. the Corporation, &c., of Willson vs. Same and of Foreman vs. Same, was changed by order of court, to the Bullitt circuit court, and the papers were transmitted to said court, where the suits remained until the 15th of April, 1867, when they were by consent of parties remanded to the Nelson circuit court, but the case of appellant against the corporation, and Carter & Thomas, was not then consolidated with the other cases, and the venue thereof was not changed.

At the May term, 1869, the executrix of Howell filed an amended petition setting forth many of the facts herein stated, and the history and progress of the suit in which she is plaintiff against said corporation, the two suits of Willson and Foreman against the same defendants consolidated with her own, and also that of appellant against said corporation and Carter & Thomas, stating very elaborately the manner in which the judgment of 1866 had been obtained, and reviewing with unmerited severity, from any thing appears in this record, the action of certain persons when the judgment was rendered, and concludes with the prayer that appellant be adjudged to pay over to her the four hundred and eighty dollars paid into court by Carter & Thomas, that the judgment of 1866 in his favor ordering the money to be paid over to him be set aside and for general relief.

The cause was submitted on final hearing on the 24th of December, 1869, appellant having previously filed his answer to appellee's last amended petition, in which he denied all fraud on his part, and other allegations therein not deemed material to state, and controverted her right in this proceeding to set aside, or modify the judgment in his favor; and the court then adjudged that of the \$400 paid into court by Carter and Thomas, appellant was entitled to \$100, this being the sum which Carter

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& Thomas were indebted to the company on the 30th of July, 1858, when she filed her original petition and obtained her injunction—and that he should pay her \$90, with interest from the 4th of November, 1868, and that J. E. Newman, who had borrowed of the Carter & Thomas fund \$150, should pay the same with interest from the 7th of April, 1860, to her, and that Wm. Murphy, who was the court's receiver to loan out the money, and who had retained one hundred dollars in his own hands, should pay her that sum, with interest thereon at six per cent. from the last named date.

And Brownfield, being dissatisfied with that judgment has appealed to this court.

Whether appellant has by his own pleadings and also by the pleadings and evidence shown that he is entitled to more than was adjudged to him, we propose first to consider.

After setting out his debts, and official returns of no property on executions issued on his judgments, he proceeds as follows:

"The plaintiff further states that the firm of Carter & Thomas, that is Mr. . Carter, of Tennessee, and Sam B. Thomas, of Kentucky, are justly indebted to the defendant the Bardstown and Green River Turnpike Road Company, a sum of money greatly exceeding the demands herein sued for, for tolls on their stages on said road from Bardstown to New Haven, and from New Haven to Glasgow, during the year ending in *July, 1858.*"

"And plaintiff further states that said corporation is still continuing to receive, and collect tolls under their charter at the gates; but that the tolls of said road, collected since *30th of July, 1858*, have been *sequestered*, or attached by the order of this honorable court at the suit of Daniel S. Howell's Exr., and that Turner Willson and George W. Foreman have also instituted suits in this honorable court against said corporation, and have obtained some orders in said actions operating upon the tolls collected *since the 30th day of July, 1858.*

"But this respondent *is advised, and believes*, that no valid, or effectual attachment has yet been levied on the debt due from said Carter & Thomas who have not been made parties to any suit brought by either of said creditors—and moreover, the attachments of the said Willson and Foreman have been discharged by order of court."

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Appellant then concludes with a prayer for an attachment and restraining order against Carter & Thomas, and that the debt owing by them be first applied to the payment of his debt, and if that can not be done, he prays that his suit be consolidated with the suit of Howell's executrix against the road company, "and that the same order of sequestration, or injunction, and restraining order be issued in this action, as was issued in that, or that the order therein had, be made effectual for the purposes of this action"—and then the following direct charge is made by appellant: "The plaintiff states *and charges* that the tolls, and money collected under order of court, after the sequestration of the revenue of said road, are funds to be divided *pro rata* amongst the creditors of said road; but the moneys aforesaid owing from said Carter & Thomas for tolls before said attachment or restraining order was obtained is subject first, to the payment of the debt to this plaintiff "

It is thus conclusively shown that appellant directly alleges twice in his petition that the revenues of the road company *accruing after the 30th of July, 1858*, were *sequestered*, seized upon, and appropriated by the executrix of Howell to her debt, limiting his right of recovery to the amount that Carter & Thomas owed *prior* to that time.

But he insists in this court that Howell's executrix had not made Carter & Thomas defendants to her petition, when he filed his petition, in which *he* made them defendants, and attached the funds in their hands, and that he thereby acquired a prior lien on them and superior to all others. In the paragraph of his petition, in which he makes Carter & Thomas defendants thereto, appellant makes no direct averments; indeed, he makes no averment whatever, that the funds in their hands had not been attached by the executrix of Howell, he merely says, he is *advised, and believes*, that no valid or "effectual attachment had been levied on the debt due from said Carter & Thomas" * * * and the attorney of appellant makes the affidavit to the petition, in which he states "*he believes the statements of the foregoing petition to be true,*" which is only in effect saying that *he believes* that his client *believes*, no valid attachment had been levied on said funds; and that perhaps was as much as he could say, in view of what had been previously alleged, and of the allegation that was to follow; in both of which the *lis pendens* of the executrix is confessed, and a valid seizure of the effects of the company by her, fully recognized,

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whereby it would seem that appellant was estopped to deny her right.

The authorities referred to by the learned counsel of appellant, have been examined, and the court can not concur with counsel that the cases are analogous.

The order for the injunction, and attachment made by the judge, in the case of the executrix, is very comprehensive, embracing all the choses in action, property, and effects of the road of every kind, it was served on the president and treasurer of the company before the appellant instituted his suit, and it appears that Carter & Thomas prior thereto had paid this fund over to the company's treasurer, whereby it was then brought under the said order of injunction, and it was his duty under said order to report it to the court. But without pursuing the subject further, the executrix by her restraining order and attachment acquired a superior lien in equity to at least as much of this fund as was adjudged to her.

As to the second and third objections urged by counsel, the executrix being entitled to the fund, would have a right to look to those who held it, having notice of her right to the same by the *lis pendens*.

Nor do we see any reason for a *pro rata* distribution of this fund—the executrix has acquired a superior equitable lien from anything that appears in this record; and appellant can yet have the credit ordered to be entered on his debt, set aside.

Wherefore the judgment is *affirmed*.

Harlan & Newman, for appellant.

JAMES M. FOGLE'S EXRS. v. WILLIE P. FOGLE, ET AL.**Wills—Discretion of Executors.**

A will gives executors a power, "All the bequests, devises, legacies, etc., are not to be paid until X X arrive at the respective ages of 30 years." Held, that the executors could not withhold all the payment, at their discretion, until the 30 year age had been reached by the devisees.

APPAEL FROM MARION CIRCUIT COURT.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

This suit is brought to have the will of the late James M. Fogle construed, or rather to have the eighth clause thereof construed, as in the preceding clauses he directs to whom, and in what portions his estate shall pass.

In the eighth clause he says: "*All the bequests, devises and legacies that are made in this will are not to be paid, or delivered to my four children, Willie P., Mattie B., Bettie P. and James L. Fogle (should the contingency happen by which he should get anything), before they each arrive at the respective ages of thirty years each. And the parts that go to Mattie B. and Bettie P. are to be owned and controlled by them each to their sole and separate use, without being under the control of any husband they, or either of them, may have. If James M. Fogle should receive any part of my estate, upon his death without child or children, the part so received is to go, and pass to his half brothers and sisters, or the survivor, or his or their children, the child, or children to receive the father or mother's part; in no event is his estate to go to his mother, or any of her kindred on her mother or father's side.*"

The devisees insist that the executors have the power, under the clause cited, to appropriate at least the income or annual profits on their respective portions to their support, and education, while the executors contend that they have no such power under the will, and can make no distribution or advancement to the devisees until, or as they attain the age of thirty years respectively. Neither the grammatical, nor literal construction of the clause under consideration sustains the position of the executors. They are not prohibited from paying over a part of the legacies—the language is that they shall not pay *all*; if the testator had said that his executors should not pay any part of their legacies to his children, until they arrived at the ages of 30 years respectively, the prohibition would have been complete, and the devisees might not have been able to enjoy their portions until they did arrive at the ages designated, but that is not the language. They are not restrained from paying a part before the period fixed. The restriction is that they are not to pay *all*. They certainly may pay a part and not transcend their power, even according the strictest construction of the

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will. Nor is there anything in the ninth clause of the will in conflict with this interpretation.

Wherefore the judgment is *affirmed*.

Russell & Avritt, for appellants.

R. & F., for appellees.

SARAH LANG'S ADMR. v. SARAH WARD.

Landlord and Tenant—Consideration.

Evidence examined and held sufficient to authorize judgment for compensation for care of old and infirm landlord.

APPEAL FROM WOODFORD CIRCUIT COURT.

September 26, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

No error is perceived to the prejudice of the appellants, in either of the decisions or rulings of the circuit court in this case.

The rejected testimony of George, offered for the purpose of proving a hearsay statement of Louis Ward concerning the terms of renting Mrs. Lang's land, was not admissible and properly disallowed. There was no such privity of interest between Louis Ward and the appellee, as to render his admission evidence against him, and the fact which the appellants sought to establish through the medium of the oral declaration of Louis Ward, was not one of traditionary reputation or otherwise such, as under peculiar circumstances, might be proved by mere hearsay evidence.

Respecting the action of the court in passing on the motions for instructing the jury, the objections of the appellants' counsel, seem to have reference to the sufficiency of the evidence on which the court predicated its rulings, rather than the correctness of the instructions as abstract propositions of law.

There is scarcely any contrariety of evidence as to the facts that during the residence of Mrs. Lang in the family of the Wards, her great age and affliction, rendered much care, attention and trouble necessary for her comfort and convenience, which boarders do not ordinarily require, and that these were faithfully

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and labriously rendered and borne by the appellee, either for her brothers who received compensation for board out of the rent of the land, or as a gratuity to Mrs. Lang, or under an express or implied promise of compensation from her; and without discussing the instructions at any length, we deem it sufficient to say that they fairly and fully present the law of the case, as developed by the evidence as to the existence and binding force of an express or implied undertaking by Mrs. Lang to pay the reasonable value of said services.

As to so much of the services as may have been within the statutory bar of limitation, unless embraced by a new promise to pay, the evidence sufficiently conduced to prove such a new undertaking as to authorize the instruction referring it to the jury, and that instruction does not seem liable to any objection.

The attempt to show a ground for a new trial for newly discovered evidence, was properly deemed unavailing by the court below both because the proposed proof of Louis Ward's declarations were inadmissible, and if this were not so the fact proposed to be proved was within the general scope of the evidence already heard, and was merely cumulative.

Wherefore the judgment is affirmed.

Porter & Greathouse, for appellants.

Turner & Twyman, for appellee.

WM. CATES v. F. J. GREEN & OTHERS.**Equitable Lien—Notice.**

Where one holds an equitable lien on property, no notice is necessary of same, to a purchaser of a subsequent and subordinate equity.

APPEAL FROM GRANT CIRCUIT COURT.

September 13, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

As the record furnishes no reason to doubt that Plunket's legal title is indisputable, the conveyance made by him *pendente lite* should be deemed a sufficient assurance of title to Cates. Green

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does not appear to have acted in buying the Equity, otherwise than as Cate's agent, and the indorsement on the memorial of his contract to procure an assignment of the title bond to Cates shows that Cates accepted the assignment as made in fulfillment of Green's undertaking. It sufficiently appears that Hudson, as assignee of Plunket holds an equitable lien on the title; and not only was there no need of notice thereof to Cates when he bought a subsequent and subordinate equity, but he had presumed actual notice when he accepted the assignment.

But, as Franks seems to owe and to have promised Cates to pay the Hudson note, the court ought, by judicial order, to have required him to pay that debt to Hudson, or otherwise procure a release of Hudson's lien, before decreeing the sale of the land for enforcing the lien against Cates, which ought to be the last resort. For this cause the judgment for sale is reversed and the cause remanded for further proceedings for effectuating the end just indicated in the mode suggested or, if that fail, for a judgment for the amount of the lien in favor of Cates against Franks on the prayer for general relief. As Green has not denied that he represented the title as unincumbered, he might be liable for the costs of the litigation and may possibly be liable to Cates for indemnity against the incumbrance, if he should fail in otherwise obtaining it, and for that purpose, the pleading, as between them, may be amended, and therefore the judgment in Green's favor is also reversed.

Drane, Collins, for appellant.

McManama, for appellee.

EWELL CRUSE v. W. B. CLEMENTS.**Parol Evidence, to Contradict Writing.**

Where an answer denies that the writing sued on, had any legal or binding force, and such defense is relied on, parol evidence as to the terms, etc., of the writing are admissible.

APPEAL FROM CRITTENDEN CIRCUIT COURT.

June 3, 1870.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

The answer in effect avers that the bill of sale was not intended by the parties to evidence a sale of the slave to appellee, but was intended to lull and quiet the slave, and place him in the possession of appellee till appellant could make some positive and satisfactory disposition of him, and puts in issue whether there was any consideration even for the pretended or asserted claim for \$800.

It is contended that parol evidence is not competent to contradict the writing. If that principle was applicable to this case, the parol evidence was not objected to, and unless it was objected to, its admission is no available error for reversal.

Upon the issue of fact raised by the pleadings, the evidence was to some extent conflicting, and irreconcilably so on any other theory than that the transaction was not in fact what it is represented by the bill of sale to have been.

After the parol evidence was heard without objection from appellant the court properly refused to give the peremptory instruction asked by him. But we are not prepared to say that the parol evidence was not competent, the answer denied that the writing had any legal or binding force, and where such defense is relied upon, parol evidence is admissible. Nor was the instruction given on motion of appellee erroneous because the effect of the qualification, was that if the jury believed from the evidence that the transaction was to enable the appellee to retain the slave for the benefit of appellant until he could dispose of him by impressing the slave with the belief that he was sold to appellee, they should find for defendant and this was proper under the pleadings and proof.

Miss Cruse was in the town of Marion where the case was tried before the evidence was closed, and perhaps before Clements whom she would contradict, has concluded his testimony, and no reason was shown and no excuse offered for not then introducing her.

The other witness, J. W. Cruse, was examined as a witness in the case by appellant on the same points to which his evidence, since discovered, relates, and it was appellant's duty to have him examined as to his whole knowledge on the subject about which

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he was testifying, and the evidence of the other witness is only corroborative of the evidence of the other witness examined by appellant and in conflict with the evidence introduced by appellee, and not a character that would certainly, and most probably change the result on another trial. If it was improper to permit the witness Clements to testify to a conversation with Mrs. Cruse, the poison was extracted by the direction of the court to the jury that they would regard only so much of that testimony as they might believe was heard by plaintiff.

Perceiving no error, therefore the judgment is *affirmed*.

Marble, Bush, for appellant.

Spalding, and Chapeze, Hughes & Lockett, for appellee.

J. C. BURCH v. TERRY PERKINS.

Judicial Sales—Commissioner—Judgment of Court.

Where a judgment excepts from a sale, of lands, "except the share of B., one of the heirs above," etc., the commissioner has no power to sell all the land, but must first set apart the portion coming to the heir.

APPEAL FROM MADISON CIRCUIT COURT.

June 13, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The judgment in the case of Perkins' heirs on petition, directs that the land of the ancestor of the petitioners should be sold "*except the share of Lydia Burch, one of the heirs above,*" her share is to be allotted off of the above tract of land by agreement of the other heirs, the residue will be exposed at public sale to the highest bidder on the premises."

No other judgment for a sale of the land was rendered in the case, consequently, the commissioner had no authority or power to sell the share of Mrs. Burch in the land of her father; but it was his duty under the judgment to set apart to her, her portion of the land and sell the residue. And if he did attempt to sell her part, could not invest the purchaser with the title, nor could she be divested without her conveyance thereof by privy examina-

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tion as directed by the Statute; and this was not done.

Whether or not the conveyance of her husband of her part of the land to an innocent purchaser for a valuable consideration without notice might not have invested him with the title we need not now decide as the question is not before us. Appellee was a party to the suit of Perkins' heirs for a sale of the land and slaves, and had actual notice of the precise condition of the title; and urged that as a reason why his vendor Burch should sell it to him at not more than one half its value.

Besides Burch paid nothing for the land, it was paid for by deducting from the price the share of Mrs. Burch in her father's estate, and the residue of the price was paid out of the price for which she sold eight acres and a fraction of the same land.

As the commissioner's deed to J. Burch, and his sale and conveyance to appellee created an impediment, and obscured appellant's title by a cloud, she had a right to maintain her suit to remove the impediment, and to dissipate the cloud from her reversionary interest in one half of the land which she derived as one of the heirs of her mother. And this was eminently proper before the land passed into the hands of an innocent purchaser. And this she was entitled to under her prayer for general relief.

Appellee is entitled to the land during the life of James Burch who is tenant by the curtesy, and to one half thereof in fee, under his purchase from James C. Burch, one of the heirs of Mrs. Lydia Burch, and as to him the petition was properly dismissed. But as to Susan Ann Burch the judgment dismissing the petition was erroneous; and the same is reversed, and the cause is remanded for a judgment for further proceedings consistent with this opinion.

Turner, for appellant.

Burnam, for appellee.

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GORDAN, HARRISON & Co. v. C. J. ACTON, & Co.

Creditors' Suit—Priorities.

Where a petition is filed in a creditors' suit, thought after the six months limitation, and reference is made in same, to the other suits then pending for the same relief, their rights can not be defeated by the other creditors dismissing so much of their petition as sought relief under the insolvent creditors act.

APPEAL FROM UNION CIRCUIT COURT.

June 2, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The appellees, J. and S. B. Sachs, and others, proceeded under the Act of March 10, 1856 to subject the property of A. McIntyre to the claims of his general creditors, because of his having sold part of a stock of goods in violation of said act, to Carpenter, White & Baker.

With that suit, several others prosecuted by the appellants against McIntyre were consolidated, and the appellants, Fecheimer & Co. at least though suing after the expiration of six months from the sale of the goods, referred in their petition to the first named suit, and sought relief on the ground therein disclosed.

After manifesting their right to relief, the original plaintiffs agreed with C. J. Acton, an execution creditor, of McIntyre, to dismiss so much of their petition as sought relief under the act of 1856, and though appellants then amended their petitions and alleged the sale of the goods in violation of said act, the court rendered a judgment giving priority to the appellees and Acton under attachment and execution liens, excluding the appellants, who did not in their separate actions proceed under the Act of 1856, till after the expiration of six months from the act of insolvency complained of, and this appeal is from that judgment.

This case must be ruled by that of *Sawyers, &c., vs. Langford, &c.*, 5 Bush, 539, according to which the appellees could not divest or defeat the rights which the appellants had acquired by the institution and prosecution of the suit for the common benefit of all McIntyre's creditors, under the Act of 1856.

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The judgment was therefore erroneous.

Wherefore the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

W. P. D. Bush, for appellants.

G. W. LOCKRIDGE v. J. T. CLARK.

Bills and Notes—Illegal Consideration.

To defeat the consideration in a note, for money borrowed to be used to corrupt an election, the illegal purpose must have been known to the lender, and he must have participated in that intent, and the accomplishment of the illegal act must have entered into the contract, forming the motive, and inducement in the mind of the lender, to loan the money.

APPEAL FROM CLARK CIRCUIT COURT.

June 15, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Although we might not concur in all the reasons of the court for the conclusion to which it arrived in the case of *Cummins vs. Overton* 18 B. M. 643. Still that opinion has been acquiesced in for more than 12 years without complaint, so far as we are aware, and it seems to be consistent with the spirit of the age as indicated by legislative tendency to discriminate favorably towards sureties in contracts where they are bound as such; in which, perhaps, courts to some extent partake. We do not therefore, feel authorized to overrule a decision so long acquiesced in, and which must be well understood; and approve the instruction given by the court below in reference to the statute of limitations.

But the instruction relative to the immoral purpose for which the money was borrowed—we can not approve. By it the jury were told that if the note sued on was given for money to be used, and was used in securing votes for, and in the election of John H. Bradshaw, as sheriff and Lockridge was aware of that, when the money was obtained from him they must find for defendant.

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This instruction is in conflict with the doctrine in *Hedges vs. Wallace* 2 Bush 422. It is not sufficient that the money was borrowed for an illegal purpose and that Lockridge knew that the borrower intended to make an illegal use of it. But the illegal purpose of the borrower must have been known to the lender, and he must have participated in that intent, and the accomplishment of the illegal act must have entered into the contract, forming the motive, and inducement in the mind of Lockridge to loan the money.

But although the second instruction was erroneous, substantial rights of appellant do not seem to be prejudiced thereby. The limitation pleaded by appellee as a bar was clearly made out and the verdict should have been for lien on that issue, and judgment rendered accordingly, and that being the case this court is not authorized to reverse the judgment—when the final result must be the same as it now is.

Breckinridge & Buckner, for appellant.

Turner, for appellee.

WM. JAMES v. J. & W. F. KUYKENDALL.**Adverse Possession—Elder Patent.**

Where the evidence shows that a survey was made of a portion of lands, held under a prior patent, possession taken and entry made, this constitutes an adverse holding which can not be defeated.

APPEAL FROM WEBSTER CIRCUIT COURT.

March 5, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The evidence shows conclusively that within one or two years after Holeman procured his patent, which covers the land in controversy, by a parol agreement, the surveyor of Union county went on the land and surveyed and set apart 25 acres, part of the land patented to Holeman, to Mrs. C. James, that was done according to the evidence of Pearson, who made the survey as early as 1842, and Mrs. James was then in possession of the land.

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claiming it as her own, which she continued to do till 1853 when she sold it to appellee, and executed to him a bond for a conveyance, describing the land by metes and bounds. The execution of the bond is proved by the surviving witness, who proves that the other subscribing witness and draftsman of the bond was dead.

Appellee took possession and seems to have retained it, except that appellant, in 1854, got possession of it, or a part of it, and appellee then brought a warrant of forcible entry and detainer against him, and finally succeeded, in the circuit court, on a traverse of the inquisition in gaining the possession, which he then seems to have retained continuously till 1866. When appellant brought an action of trespass against William F. Kuykendall, alleging that he was in the possession of the land and that the defendant had entered upon said land, cut the corn stalks and plowed it up, and prayed damages for the wrongful entry. To that action no defense was made and a judgment was rendered against said W. F. Kuykendall for the recovery of the land. It appears from the weight of the evidence, even if the petition authorized the judgment, that the defendant was not in the possession either as tenant of appellee, or otherwise, and the judgment could not effect his rights. Prior to the commencement of this last named action, appellee and those under whom he claimed, had been in possession long enough to have acquired possessory title paramount to that under which appellant claims.

Moreover it is clearly shown by the proof that when the conveyance was made to appellant, the land was adversely held, as it was when it was conveyed to Lynn, his vendor, and consequently the title did not pass to him.

Wherefore the judgment is affirmed.

Rodman & McElroy, for appellant.

Givens, for appellees.

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DUNN & ANDERSON v. JAS. M. ANDERSON.

Infants—Parent and Child—Necessaries Furnished Child—Payment for—Notice of Non-payment for Other Articles Furnished.

APPEAL FROM GARRARD CIRCUIT COURT.

September 16, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

From the evidence in this case it appears that when the goods were sold and delivered to Mrs. Anderson, she was living with her father, constituting one of his family, under 21 years of age, and although he had been found a lunatic, still for the support and maintenance of his family, including his daughter, Mrs. Anderson, his estate in the hands of his committee, would have been responsible, but it appears that appellants had been notified by the committee that for goods sold to the appellee, Mrs. Anderson, the estate of her father would not be responsible, and the credit for the goods sold to her, after that, was given to her alone, of which it seems she was notified. And if at the time they were purchased she labored under no disability, she would be liable for their value, but she alleges in her answer that at the time of the sale she labored under the disability of infancy, though was willing to pay for such articles as were bought for her own use, or such as were necessary for her. And her infancy at the time was proved by her sister. And there is no evidence that she has placed herself under any legal obligation to pay said account since that disability was removed. The judgment recovered against her by appellants is for as much as would cover the articles necessary for her in her condition in life; for this reason therefore, the judgment is as favorable to appellants as they are entitled to.

As to the alleged error of the court in refusing to permit Anderson, the retiring partner, to testify, he was a plaintiff, and as such had incurred costs, and even if he was otherwise competent after transferring his interest to Dunn, he could not have been examined until a bond with surety, or a bond satisfactory

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to the court had been tendered, securing not only to appellees the costs which might accrue, but those which had already accrued, or proper orders had been made securing all the costs—neither of which had been done in this case. Sec. 32, C. C.

But under the rulings of this court in *Dougherty vs. Smith, Wilson & Co.*, 4 Met., 279, he was not competent.

No sufficient grounds were made out for a new trial, by reason of the affidavits, appellants got judgment for the additional sums they could have proved by *Mrs. Anderson and Mrs. Reid*, and as to the other witnesses, no sufficient reason is shown why their evidence was not produced on the trial. Appellants knew the witness who had gone to Missouri—was absent when they went into the trial, and knew what she would prove.

Judgment affirmed.

Anderson, for appellants.

Dunlap, for appellees.

JANE L. WHAYNE v. N. C. HOWARD & BRO.**Conversion—Husband and Wife—**

An action for conversion will not lie, by a wife against purchaser of personal property from her husband, where the records show she acquiesced therein in writing, though the instrument was defective.

Same—Election of Causes.

Nor, where she afterwards accepted an assignment of the pending suit, brought originally in the name of her husband, can she sue the purchasers, because she had failed to receive from the attorney of her husband, a part of the purchase money paid to him through order of court, on the account.

APPEAL FROM HENDERSON CIRCUIT COURT.

March 5, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

January 7, 1860, N. C. Howard and Brother, received of M.

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J. Whayne, appellant's husband, two negro slaves at the price of \$2,500 and executed the following receipt: "Received of M. J. Whayne two thousand five hundred dollars in part pay for my livery stable." March 3, 1860, M. J. Whayne brought an equity suit to enforce a parol contract for the lot and livery stable, situate in the city of Henderson, Kentucky, against the Howards, averring that the agreed price was \$6,000, and that the remainder was to be paid in one and two years, but if a specific performance of the contract could not be held that then a judgment for the advance payment be granted him.

July 6, 1860, the defendants answered denying the parol contract as set out in the petition, but averred it was not only for the lot and stable but for their stock, carriages, harness and everything pertaining to the livery stable business, amounting to some \$13,600.

They also set out that the slaves were taken in said trade at more than their cash value which did not exceed \$2,300, and that Whayne had refused to execute the contract as made and by reason thereof they had been injured \$1,000, which they pleaded as a counter claim.

In the meantime, April 3, 1860, Whayne had made and put to record a deed to his wife reciting that by the consent of his wife he had previously sold the two slaves, to the Howards for a livery stable, which trade had not been consummated and that he then had a suit pending against them and that as the slaves were her property he conveyed the said claims and pending suit to her use and benefit to hold in the same way as she held the slaves.

July 9, 1860, the court rendered judgment for \$1,300 against the Howards as so much uncontested of the plaintiff's claim.

They subsequently replevied said judgment and November 5, 1860, paid the amount thereof to the attorney who brought and was conducting said suit.

The matter thus rested until January 15, 1864, when Mrs. Jane Whayne filed her petition to become a co-plaintiff predicated on her ownership of the slaves and the deed of her husband transferring said claim on the Howards and the benefit of the pending suit to her, which deed she made an exhibit.

The parol proof shows that by an agreement between Whayne, the Howards and Hutchins, the slaves were sold to the latter at \$2,300 and to save writing and bills of sale Whayne and wife,

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by bill of sale, conveyed the slaves to Hutchins, she signing it with her own proper hand, thus verifying the recitals of her husband's deed which she had accepted and claimed under.

Failing to get the money so collected from the attorney, she subsequently filed an amended petition going against the Howards for a conversion of her slaves.

But the court on final hearing adjudged to her their proved cash value, \$2,300, credited with the amount of the former judgment which the Howards had paid to the attorney, and she now seeks a reversal of this judgment.

Whatever may have been the defective execution of her bill of sale of the slaves to Hutchens because not properly acknowledged and recorded, she can not recover against the Howards as for a conversion.

1. Because, by her own conduct she placed the means in Hutchen's hands to take the slaves out of the State and sell them, knowing when she made the bill of sale that such was his intention.

2. Because, she afterwards accepted the deed of her husband conveying the benefit of the pending suit against the Howards and claiming under it, which recites that the sale of the slaves was made by her consent, and which is also established by the joint proof.

3. Because, after she became entitled to said suit and its proceeds the attorney who had brought it and was conducting it for her husband became her attorney, as the husband was then. in equity, her trustee and the benefits of the suit were hers. not only was her husband but she herself is bound by the payment made to him, the payment being in the husband's life time, he having subsequently died.

The judgment being essentially right, just and equitable it is affirmed.

Turner for appellant.

Vance & Trafton, for appellees.

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ALBERT BRADSHAW v. GLASSER BROS. & CO.

Principal and Surety—Subrogation—Fraudulent Conveyance.

A. made a mortgage to B. to indemnify him as surety on a replevin bond, and also included in the mortgage other debts due. In an action to set aside the mortgage as a preference, the principal in the replevin is not subrogated to the rights of the judgment creditor that would give him priority over other creditors, since there had never existed a lien in favor of the judgment creditor.

APPEAL FROM MCCrackEN CIRCUIT COURT.

June 1, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

On the 4th of December, 1866, John L. Seaton mortgaged to the appellant a stock of goods and merchandise to secure the payment of a debt of \$300 to appellant, and to indemnify him as Seaton's surety in a debt to the First National Bank, at Paducah for \$500, and a debt to Staddler & Brother for about \$2500.

This controversy involves the enquiry whether the mortgage was made in contemplation of insolvency and with the design to prefer the appellant to the other creditors of Seaton and operated under the Act of March 10th, 1856, (1 R. S. 553) as an assignment and transfer of his property for the benefit of all his creditors. It is equally apparent from the mortgage and extrinsic evidence that the object of the mortgage was to secure and indemnify appellant as the creditor and surety of Seaton who, as well as the appellant, must, we think, from the evidence, have contemplated his approaching insolvency, and that all the debts were pre-existing liabilities of Seaton. And that the mortgage, as to the debts of \$300 and 500 was within the interdiction of the statute, does not admit of any question.

But it appears that the liability of the appellant for the debt of \$2500 was created by the execution of a replevin bond before the clerk of the McCracken circuit court, but three days before the date of the mortgage; and that Seaton, and the attorney who had obtained the judgment against him, have entered into an agreement under which it was contemplated that Seaton would

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appropriate the proceeds of the goods, subsequently mortgaged, to the payment of the debt, and if he did so, as he made sales of the goods, indulgence would be given, provided the liability of his surety should not be affected. And this seems to have been known by the appellant, when he united in the replevin bond; but it does not appear that he was a party to the agreement; or that he had any promise or assurance from Seaton, when he replevied the debt, that the mortgage would be made; on the contrary the evidence rather conduces to the conclusion, that the execution of the mortgage, was the result of his becoming apprehensive of loss, upon discovering the real value of the goods, after he had become bound in the replevin bond. It is insisted however, for the appellant, that as the plaintiff in the judgment might have proceeded by execution to coerce the debt by a sale of the goods, if the appellant had not rendered that action unnecessary by replevying the debt, and the general creditors of Seaton would thereby have been overreached, they were not prejudiced by the mortgage of the property; and if the transaction was technically prohibited by the statute, the appellant was nevertheless entitled to priority by substitution for Staddler & Brother, to whom he was compelled to pay the debt of \$2500.

But we do not concur in these inferences, from either aspect of the case. It is not certain that the mortgage did not seriously prejudice the rights of the general creditors. It certainly affected them, in a manner intended to be prohibited by the statute; and whatever might have been the equitable rights of the appellant, if he had replevied an execution which had been levied or have a lien on the goods, and afterwards paid the debt, as no lien ever existed in favor of the plaintiffs in the judgment, no principle of equitable subrogation is perceived, upon which the appellant was entitled to any preference over the other creditors of Seaton, in the distribution of his effects.

Wherefore the judgment is affirmed.

Husbands, for appellant.

R. M. Harding, for appellees.

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WM. CLAYTON v. GEO. HAMILTON.

Pleading—Action for Tort—Misjoinder.

A petition was filed, setting out both an action on the case for consequential damages, and against the bond, for a wrongful levy, after attachment issued. An amended petition was filed, asking judgment on the bond alone. Held, That as the original petition sued for the tort as well as for the breach of contract, the filing of the amended petition some time afterwards, was not the commencement of the action for tort, and limitations did not apply.

APPEAL FROM BATH CIRCUIT COURT.

August 18, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

The sale of the pig iron under an execution issued, after the appellant's attachment was levied on it was illegal; and consequently, the attachment having been afterwards sustained, the appellee, as mover of the execution and purchaser under it became liable to the appellant for the wrongful conversion of the iron to his own use. And the court sustaining the attachment might have enforced it. But that liability might be also enforced by either an action on the appellant's bond to the sheriff or by a special action on the case for consequential damages. The appellant's original petition may be construed as combining both forms of action and, according to section 113 Code of Practice, the answer waived the misjoinder of contract and tort. An amended petition claims judgment on the bond alone; and on a rule requiring the appellant to elect whether he would proceed either for tort or a breach of contract, he elected to prosecute the action for the tort alone. And thereupon the circuit court, adjudging that the action for the tort was barred by limitation, dismissed it.

As the original petition sued for the tort as well as for a breach of contract, the filing of the amended petition long afterwards was not as erroneously adjudged, the commencement of the action for the tort, and the original petition having been filed within the statutory time, the action, as prosecuted was not bound.

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Nor is it material whether the appellant's title or possession would have sustained the technical action of trover and conversion.

The facts alleged are sufficient to maintain a special action for a tortious act.

Wherefore the judgment is reversed and the cause remanded for a new trial, with leave to the appellant to amend and thereby re-elect to proceed on the bond or for the tort alone.

Stone, Lacy, for appellant.

Apperson & Nesbitt, Young, for appellee.

E. T. WHITE v. WM. G. FERGUSON.

Partnership—Use of Name of Firm After Dissolution.

Though, after dissolution of a partnership, neither partner can, on account of the partnership relations, bind the other by use of the partnership name, either member may use the name of the other for the purposes of the late partnership, if authorized and permitted to do so by the other.

APPEAL FROM DAVIESS CIRCUIT COURT.

November 2, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

It is indisputably true, as contended for the appellant, that after the dissolution of the partnership neither Blair nor the appellant, could, on account of late partnership relations alone, bind the other by the use of the partnership name; but nevertheless, either of them may have used the name of the other, for the purpose of the late firm and otherwise,—if authorized and permitted to do so by the other.

It appears from the admitted cash account of the late firm, that the money borrowed of Ferguson and Small went to the use of the firm, and from the facts and circumstances proved, we cannot decide, that the circuit court did not properly conclude,

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that the notes of the late firm were executed by Blair, with the assent and by the authority of the appellant.

Wherefore the judgment is affirmed.

Harlan & Newman, for appellant.

Sweeney & Stuart, for appellee.

A. WILLIAMSON v. W. T. TURNER.

Parties—Defect of—Special Demurrer.

Under Civil Code, section 121, where a defect of parties is not assigned as a cause of demurrer, such defect can not be reached by a general demurrer.

APPEAL FROM HARRISON CIRCUIT COURT.

November 1, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

Although the appellee could have maintained his action for enforcing the agreement of the appellant to pay the debt, yet as Lowry, the original payor of the note, and Lacy were not made parties in the petition, there was a defect of parties, at least till the cross pleadings were filed (*Garvin & Co. vs. Molloy, &c.* 1 Bush, 48). But this defect of parties was not assigned as a cause of demurrer, and the general demurrer did not reach it (Civil Code, Sec. 121.)

Nor do we think the court erred in rendering judgment in favor of the plaintiff for the debt. No diligence was used in endeavoring to collect the small debts claimed to have been either unjust or unavailable. That seems to have been a small error in the inventory against the appellant, and perhaps a larger one in the calculation in his favor; moreover a heavy discount was allowed him by most of the creditors of Lacy; so that when he shall have paid the judgment of the appellee, and the residue of

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Lacy's debts, not released, he will not have paid as much as he agreed to pay for the goods and effects of Lacy.

Wherefore the judgment is affirmed.

Boyd, for appellant.

Cleary & West, for appellee.

R. E. SANDEFER, &C. v. ANDREW LYNN.

Judgment—Collateral Attack.

A judgment, properly rendered, is not subject to a collateral attack, and relief from same can only be granted on the grounds as provided in section 373 and 579, Civil Code.

APPEAL FROM WEBSTER CIRCUIT COURT C. P. DIV.

November 8, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

On the 13th of February 1869, the appellee obtained a judgment against appellants for a sale of a tract of land to satisfy debts due him as purchase money for said land, after said judgment had been executed by a sale of the land, and the sale confirmed, and long after the expiration of the term of the court at which said judgment was rendered, this suit was brought for a new trial of said cause, or for a modification of said judgment.

But the relief sought can only be granted when the grounds, or some one of them shall be alleged, and made out by proof, as specified in sections 579 and 373 of the Civil Code. If any of the grounds prescribed in said sections are sufficiently alleged in the petition, certainly no one of them is made out by the evidence.

For mere errors in the judgment the proper remedy is by appeal to this court. Whether such errors exist in the proceedings and judgment sought to be vacated or modified by this suit, it is not proper for this court to express any opinion, as the judgment is not before us for review. As therefore we perceive no error in the judgment appealed from, the same must be *affirmed*.

Givens, for appellant.

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RICHMOND L. STEERS v. WM. YORKE.

Adverse Possession—Statutory Bar of Action—Mistake in Boundary.

One, who had actual possession of the land in controversy, openly using and claiming it as his own for the requisite time to make the statute of limitation a bar, as in ordinary cases of continuous, adverse possession, the fact that he placed his enclosure beyond the true line, by mistake, could not affect his right, to rely on the statutory bar.

APPEAL FROM KENTON CIRCUIT COURT.

September 22, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

We perceive no ground of objection to the first instruction given to the jury at the instance of the plaintiff, but regard the second instruction so given as misleading and erroneous in virtually depriving the defendant of the benefit of an adverse possession of the ground in controversy, if while so holding it he labored under a mistake as to the true boundary of the lot. If he had actual possession of the ground, openly using and claiming it as his own, for the requisite time to make the statute of limitation a bar as in ordinary cases of continuous, adverse possession, the fact that he placed his enclosure beyond the true line, by mistake, could not affect his right to rely upon the statutory bar. And for the same reason the qualification given by the court to the second instruction asked for the defendant, was also erroneous.

Wherefore, for the reasons indicated, the judgment is reversed and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

Fisks, for appellant.

Carlisle, for appellee.

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O. F. STIRMAN'S ADMR. v. FRED HAHN.

Covenant—Damages—When Action for Eviction Accrues.

A judgment, against a vendor, in an action to recover the land, is sufficient evidence of eviction, to authorize a right of action immediately for damages for breach of covenant.

APPEAL FROM JEFFERSON CIRCUIT COURT.

June 10, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The suit to recover the land from Stirman had been brought before he sold to Hahn, and the latter being a *lis pendens* purchaser was liable to be dispossessed under the final judgment for the recovery of the land against his vendor. The judgment alone without any further fact, was sufficient evidence of eviction. It was appellee's duty, after judgment, to yield the possession, he had no right to resist; and therefore the judgment itself was a virtual eviction. Woodward vs. Allen, 3 Dana 164; Radcliff vs. Sharp, Hardin 293.

Having been virtually evicted, appellee's right of action for a breach of the covenant of warranty in his deed was complete. And no error appearing in the proceedings in the court below the judgment must be *affirmed*.

A. Barnett, for appellant.

Allmett, for appellee.

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R. G. SHARP'S ADMR. v. DANIEL WARPER.

Depositions—Provisions—Presence of Examiner.

The failure of an examiner to state that the depositions of the witnesses were subscribed by them in his presence is error, authorizing a reversal.

APPEAL FROM BATH CIRCUIT COURT.

September 12, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

In this case the only question presented to the court, is, as to the right of the appellee Warper to the proceeds of the judgment rendered on the note of Boyd. The appellee introduced several witnesses in support of his claim and their depositions were each and all excepted to by the appellant on account of a defect in the certificate of the examiner appended thereto. The certificate fails to relate either that the depositions were read to the witness by the examiner or subscribed by the witnesses in his, the examiner's presence. The first objection should not be well taken as the witnesses wrote their own depositions, but the failure to state that the depositions were subscribed by the witnesses is a fatal defect. The exceptions should have been sustained by the court and for this error the judgment is reversed and the cause remanded with directions to the court below to sustain the exceptions and give to appellees the right to retake the depositions.

Stone, for appellant.

N. P. Reid, for appellee.

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JAS. A. SMITH v. KOHN & WILE.

Attorney Fee—Pleading—Averment of Petition.

In order to recover an attorney fee, provided for in a note, the petition should have averred the payment of same by the holder of the note.

APPEAL FROM MCLEAN CIRCUIT COURT.

November 7, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

When the action is founded on the written obligation of the defendant no verification by affidavit is necessary—Sec. 143, Civil Code. In this case by the obligation itself the defendant agrees to pay the attorneys' fee, and although it was necessary to aver not only what a reasonable attorney's fee was, but that appellee had paid it, still the writing being the basis of the action, and the only evidence required of the obligation to pay, no affidavit was necessary. The petition should have averred, in order to authorize a judgment by default, the payment of the attorney's fee by the appellee and for the failure to make this averment the judgment allowing the attorney's fee is reversed and cause remanded for further proceedings consistent with this opinion.

Prentice, for appellant.

TYLER W. McAHAN v. W. B. WOODRUFF.**Vendor and Purchaser—Partial Payments—Sale Under Lien.**

Notes for purchase money were given in small installments. In a suit of foreclosure, held that the defendant is not required to raise all the money on the notes not due, and the sale could only be, for the one note, subject to the lien for the purchase money not due.

APPEAL FROM HENDERSON CIRCUIT COURT. C. P. DIV.

March 6, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

In this case the appellee Woodruff was the owner of all the notes executed for the property and directed to be sold by the judgment. There was only one of the notes due at the time of the filing of the petition, and when the judgment was rendered. This note was only for one hundred dollars, and before the sale the appellant might have been able to raise means to pay off this note when he could not have placed himself in a condition to satisfy the whole of the purchase money. He was not required by reason of any obligation to pay, to discharge these installments until they fell due, nor did an allegation only that the lot was indivisible, authorize the judgment herein rendered. The property should have been sold subject to the liens for the purchase money not due. *Denton vs. McKinney*, 6th Bush, 468. The judgment of the court below is reversed and the cause remanded with directions (the appellee being the purchaser) to set aside the sale made in pursuance thereof and for further proceedings consistent herewith.

James, C. Naves, for appellant.

MORTON v. MORRIS.

Courts—Motion to Transfer Cause—Waiver.

A motion to transfer a cause to the equity docket is waived, where at a subsequent term, the parties appeared and a jury sworn without objection from either party.

APPEAL FROM CAMPBELL CIRCUIT COURT.

February 16, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

While it is true that appellant did make a motion to transfer the cause to the equity docket, still, at a term subsequent thereto the record shows, the parties appeared and a jury was sworn

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without *objection on the part of appellant* to try the issue, was a waiver of the motion to transfer.

And as to the evidence of the acknowledgment of the debt as proved by the witness was within five years after the original contract was made, in such case no direct promise to the creditor was necessary, even if otherwise necessary.

These propositions we regarded as too plain to require a formal discussion in the opinion.

And hence they were not particularly noticed.

Petition overruled.

Hawkins, & Boden, for appellant.

Hallam, for appellee.

H. MADDOX v. ROBT. WATSON'S ADMR., &C.**Conflict of Laws—Amendment of Constitution**

Where an amendment to the Constitution of the U. S. has not been ratified by the required number of States, its provisions can have no bearing on matters arising during its process of ratification.

APPEAL FROM FULTON CIRCUIT COURT.

February 28, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

Appellant did not object to the consolidation of the suit brought by himself against the heirs of Robert Watson, with the suit of Watsons Admr. vs. His Heirs and Creditors. Nor to the order referring the consolidated cases to the master.

The master it seems heard all the proof offered by either party. Appellant did not object to the manner in which such proof was taken, nor can we perceive that he was at all prejudiced by the fact that the statements of the witnesses were in the shape of affidavits instead of depositions. The cause was several times recommitted and he might have cross examined the witnesses of appellee had he chosen to do so.

Considering all the proof in the case it is manifest that the slaves of Watson lived on the premises of appellant during the

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year 1864, that they were sometimes employed by him and that he loaned to them horses and lands, and thereby encouraged them to remain away from their owner and to refuse to serve him.

The 13th amendment to the Federal Constitution had not then been ratified by the requisite number of states, and appellant must be held accountable to the owner of the slaves, for the reasonable value of their services during the time he thus disregarded the legal rights of their owner by encouraging them to remove away from him. The exception to the account for \$36.65 was intended to be and was treated by all the parties, as a plea of the statute of limitations. The exception was properly sustained. The claim for \$77.00 having been withdrawn, the circuit court properly rendered a judgment against appellant for the amount of the claim of Watson's Admr. for the services of the slaves, credited as it was by the amount of the note conceded to be due and unpaid.

The judgment appealed from is affirmed.

James, for appellant.

Kingman, H. A. Tyler, for appellee.

MAT WORTHINGTON v. P. J. GREEN, & CO.

Mortgages—Plea in Bar—Former Judgment.

Where the records in the lower court shows that the hirer of personal property was not made a party to a foreclosure of a mortgage on same, therein, he can not plead said record and judgment in bar to a recovery in the circuit court.

APPEAL FROM GRAVES CIRCUIT COURT. C. P. C.

March 8, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The conditions of the mortgages having been broken, appellees had the right in this action to recover possession of the mortgaged property, unless the contract of hiring between appellant and the mortgagor invested the former with a right of possession superior to that of the mortgagees, or unless the proceeding in

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the quarterly court, deprived the common pleas court of jurisdiction over the subject matter of the controversy.

The affidavit of Worthington which was admitted to be true, shows that he hired the mules and wagon, for the year 1871, from the mortgagor Morris, before the institution of this action. It does not show that the hiring was made prior to the execution of the mortgages to appellees. Other testimony conduces to show that such hiring was made subsequent thereto. Such being the case Worthington like the party under whom he claims held the property subject to the rights of appellees.

The record of the proceeding in the quarterly court, was not presented as evidence to the common pleas judge. The testimony of the quarterly judge shows that the mortgages were foreclosed, in a suit vs. the mortgagor, Morris, but there is nothing to show that Worthington was before that court, or that he can be dispossessed of the property under that judgment, unless he was a party and his right to the possession of the property, as against these appellees, was determined in the suit in the quarterly court, its judgment cannot be relied upon by him as a bar to a recovery in this action. Perceiving no error in the proceedings in the court below prejudicial to the rights of appellant, the judgment must be affirmed.

Williams & Turner, for appellant.

A. B. Stubblefield, for appellees.

JOHN E. NEWMAN v. NATHANIEL WICKLIFFE, EXOR., &C.

APPEAL FROM NELSON CIRCUIT COURT.

January 9, 1872.

RESPONSE TO PETITION FOR REHEARING BY JUDGE PRYOR:

The record in the case of Newman vs. Wickliffe Executor was carefully considered by this court, and we are now unable to perceive what the original suit of Wickliffe Exor. vs. Grigsby has to do with the present controversy except for the purpose of showing that in the last named suit the rule against Newman to pay the money into court was issued. The appellees on the

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trial of this case offered to read parts of the record in the case of Wickliffe Exor. vs. Grigsby, and the appellant Newman objected, and the parties agreeing "*that the question before the court was not to determine to whom the money in controversy would ultimately belong, the court sustained the objection.*"

Grigsby, as receiver took possession of this money and failed to account for it when ordered by the court to pay it over, the appellant Newman was his surety, and this court after considering fully the grounds relied on for a rehearing must overrule the petition. The statute of limitation is no bar to the proceeding for the reasons set forth in the opinion delivered. The appellant by the judgment of the court is required to pay the money over to the commissioner Linthicum in order that he may pay it out to the parties entitled. If Wickliffe is dead, it cannot effect the rights of the appellant; all he is required to do is to pay the money into court, or to the commissioner as directed by the judgment. The parties who are litigating in regard to this money are making no complaint, and if they were the judgment is right and proper.

Newman, James, for appellant.

Muir & Wickliffe, for appellees.

NATIONAL BANK OF LEBANON, &C. v. CAMPBELL & IRVIN.**Assignment for Benefit of Creditors—Deed of Vendor.**

A deed is attacked as fraudulent, and is sought to be made an assignment for the benefit of creditors; the vendor was not made a party, but the vendee only. Held, on a claim that as the legal grantor not being before the court, there was no such action for subjecting the property as contemplated by statute, that the deed vested nothing in the vendee and was merely a preference.

Same—Parties.

The vendee could be brought before the court for the purpose of passing the legal title at any time.

APPEAL FROM MARION CIRCUIT COURT.

March 19, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE HARDIN:

The facts disclosed in the record satisfy us that Mitchell made the deed to Spalding in violation of the provisions of the act of March 10, 1856, and that it operated as an assignment of his property for the benefit of his creditors; but as by the second section of that act suit should have been brought to subject the property within six months, and Spalding was not sued at all, but only the bank and other beneficiaries under the deed, it is contended that for this cause the judgment must be reversed on two grounds; first, for a defect of parties, Spalding not being sued; and second, he as the legal grantor not being before the court there was in fact no such action for subjecting the property as contemplated by the statute. The first ground of objection was, no doubt a cause of special demurrer, but the advantage not being so taken, it was waived. (Civil Code, sections 120, 121 and 123.)

Nor can we regard the other objection, taken to the judgment, an available one for reversing the judgment. The deed vested nothing in Spalding, being the naked legal title; its plain and manifest, meaning and effect being to secure the bank as the beneficiary. We must regard this suit against that corporation, brought in apt time, as it was, as substantially an action under the statute for having the deed construed to operate as an assignment; and if Spalding should be brought before the court for the purpose of passing the legal title to purchasers or others, it is not, as supposed in the argument, too late to do so yet.

The judgment is affirmed.

W. B. Harrison, for appellants.

R. & F., for appellees.

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CARY MINTER v. COMMONWEALTH.

Bail Bond—No Amount Stated—Void.

Where a bond for appearance of a defendant, is blank as to amount, no penalty is annexed to the condition, and the principal in such bond is not liable thereon.

APPEAL FROM CALLOWAY CIRCUIT COURT.

December 6, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

The record in this case shows a mere attempt on the part of the appellant to execute a bond for the appearance of Cary Minter to answer the offense with which he was charged. The bond was blank as to the amount and therefore no penalty was annexed to the condition thereof. The appellant is not liable on such a writing and the judgment rendered by the court below is reversed and cause remanded with directions to dismiss the proceedings as against the appellant.

L. Anderson, for appellant.

ARMSTEAD MILLER v. SUSAN M. LAYNE, &C.**Boundaries—Accretion—Streams.**

The doctrine of accretion, as decided in 3 Bush, 3 Bibb (Yoder v. Swope and Hardin, 259), is not applicable to small streams and branches, but to navigable streams, and a deed, "bounding on the creek," etc., means to the edge of the creek and not the center.

APPEAL FROM MERCER CIRCUIT COURT.

February 12, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

The answer of the appellees, if sustained by the proof, presents an equitable set-off to the appellant's demand. It is not required that they should allege either insolvency or that the plaintiffs are non-residents. This is an action for a breach of warranty by reason of a defect in the title. The answer alleges that the appellant sold to appellees land to which he had no title and that this land is not embraced within the boundary of the deed made him by the appellant—that the appellees were ignorant of the fact when the deed was accepted, and that appellant knew that the land he represented as being within the boundary was outside of it. We have read the testimony upon the questions involved with much care, and have been unable to ascertain upon what facts the chancellor in the court below based his judgment. The boundary of the lot owned by Mrs. Chinn, or conveyed to Moore, as trustee, bounds on a small branch, that seems to be the dividing line, between the lot sold by appellant to appellees, and the lot owned by Moore as trustee. It is claimed by the appellees that the stable sold them by appellant or a part of it, is on this Chinn lot. This Chinn lot is enclosed on the southern boundary with a stone wall that runs to the water's edge, and no control or possession seems to have been exercised or claimed of any land outside of this wall until this controversy originated or shortly before. There is no part of this stable in controversy within eight feet of this wall. This rock fence was built where it now stands twenty-five or twenty-six years ago. The parties owning the property known as the Chinn lot whilst this stable was being built never claimed that this boundary interfered with it in any way. The witnesses Hardin, Spillman, Stagg and Springer, old citizens of Harrodsburg and who have known this property for years, say that the stable is not on the Chinn lot or any part of it, and if it is, as contended for by appellees that the damage would not exceed five or ten dollars. Two of the appellee's witnesses—Stone and Thomas place an ideal value on this part of the stable supposed to be on the Chinn lot and upon this testimony, doubtless, the judgment was based in connection with the lawyer's report, made also upon the existence of a supposed state of facts. The deed to the trustee for the Chinn lot describes it as the lot binding on the creek imme-

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diately on the north side of same creek or branch containing it all. This boundary was recognized by the grantor of the deed to Moore as trustee "*as binding on the creek immediately on the north side of said creek.*" The words binding on the creek without any other language indicating the boundary according to the opinion of this court in the cases of Yorder vs. Swope, 3 Bibb, and Sander vs. McCracken, Hardin's reports, page 259, would confine the boundary to the edge of the creek and not to its center. The case referred to in 3 Bush was discussed and decided with reference to large navigable streams where the doctrine of accretion was made to apply to the owner of the land adjoining. This doctrine is not applicable to small streams and branches. In the present case the deed itself under which the appellees set up this adverse claim, fixes the boundary immediately on the north side of the creek. The judgment of the court below is reversed with directions to dismiss all the cross petition of the appellees and render a judgment for the appellants for the balance due him on the notes and for further proceedings consistent with this opinion.

Kyle & Poston, Lindseys, for appellants.
Thompsons, for appellees.

LOUISA J. EDWARDS v. ROBERT CRADDOCK, &C.**Vendor and Purchaser—Purchase at Sheriff's Sale.**

Under a contract for the sale of land, the vendee took possession, and held same about two years, the residue of the purchase money being unpaid. There was then levied on the land an execution against the vendor, the land sold, the equity of redemption levied on and sold, all of which was bought by the original vendee. Held, in an action on the original notes, the vendee could not claim under the purchase at the sheriff's sale, and defeat the lien notes. All that was taken by the sheriff's sale was the right to have the money so paid, refunded by crediting the notes with the amount.

APPEAL FROM GREEN CIRCUIT COURT.

March 2, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

This suit in equity was brought by appellee, Craddock, assignee of D. W. Edwards, against appellant, L. J. Edwards, on two notes for two hundred and twenty-nine dollars and thirty-seven cents each, which is alleged were executed by L. J. Edwards for part of the purchase price of a tract of land sold by said D. W. Edwards to her, and for which he executed to her his title bond, and Craddock sought to subject the land to the payment of said notes, alleging that there was a lien retained on the same to secure their payment. He made his assignor a defendant to the suit, but failed to allege that he had conveyed the land to his vendee, or that he had title, and was able to convey the same, and no tender of a deed was made in the petition.

The defendant, L. J. Edwards, answered, and admitted that she had purchased the land as alleged and that the notes sued on were executed for part of the purchase price, but she alleged that after she purchased the land from D. W. Edwards, and had taken possession thereof, an execution was placed in the hands of the sheriff of the county in which the land was situate, and was levied on it, that it was sold by virtue of said levy under said execution, and one Vaughn bought, but as it did not bring two-thirds of its value, the equity of redemption was levied on and sold under said execution and she purchased under the last sale, and D. W. Edwards having failed to redeem the land she paid to Vaughn, the first purchaser, the amount due him, and obtained the sheriff's deed, under which she claimed the land, exhibited the executions and deed, alleges that the consideration for the notes had failed, makes her answer a cross-petition against D. W. Edwards, her vender, and Craddock, and prays for a judgment in bar of a recovery on said notes.

The answers to the cross-petition controvert the claim of appellant to the land under the sheriff's deed, deny that the land was subject to sale under the execution, and the defendants to said cross-petition allege that appellant had purchased by executory contract and had possession of said land before the executions issued, and that D. W. Edwards had no interest in the land and that appellant took nothing by her purchase under the sale and deed made by the sheriff; but say they are willing and offer

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to give her a credit for the amount she paid on the executions which were levied on the land, and D. W. Edwards alleges that he is able and willing to make to her a title to the land, and tenders to her a deed with covenant of warranty, and relinquishment of his wife's right to dower, and prays that the vender's lien be enforced.

On hearing the court below rendered a personal judgment against L. J. Edwards for the amount of the notes sued on to be credited by \$116.10, the amount she paid the sheriff on the purchases made under his sale, with interest from the time of the payments, and from that judgment L. J. Edwards appealed, and Craddock and his assignor prosecute a cross-appeal.

It is now insisted for appellant that she was at the date of the judgment a married woman, and no personal judgment could have been rendered against her—and further, that by her purchase under the sheriff's sale she acquired the title to the land, and thereby absolved herself from any obligation to pay the notes.

The contract for the sale of the land by D. W. Edwards to appellant was made nearly two years before the execution issued against Edwards, and after she took possession of the land under said contract, and even if she took anything under her purchase at the sheriff's sale all that she could in any event claim would be to have her money refunded by crediting her with the amount, no authority need be cited to sustain that position, that credit she got by the judgment.

But it does appear from the title bond executed to her by D. W. Edwards and which appellee, Craddock, made part of his answer to the cross-petition that she was then a married woman, and that being her creditor then, without any allegation to the contrary, her coverture must be presumed to continue, consequently, the personal judgment against her was erroneous.

Appellant's answer to the original petition admits that D. W. Edwards had title to the land when he contracted to sell it to her and she claims to have acquired the title by the sheriff's deed, and she thereby at least impliedly admits that he had title to the land when she purchased—and in his answer to her cross-petition he professes a willingness to make title and tenders a deed—which, however, is not such as she was bound to accept but the contract may be specifically enforced.

The judgment, however, must be reversed on the original appeal, for the reasons stated, with directions to permit appellee,

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Craddock, to amend his pleadings and make the husband of appellant a defendant to the suit, and permit additional pleadings by the defendants, if they should desire to do so. The deed tendered by D. W. Edwards, as before observed, was not such as appellant was bound to accept; it is blank as to the month it was made, and does not appear to have been acknowledged till late in November of the year it was made, and as to the price for which the land was sold, the deed should set forth the consideration paid for the land and for this defect and want of sufficient allegations in the pleadings the judgment must be affirmed on the cross-appeal.

But on the original appeal the judgment is reversed and the cause is remanded with directions for further proceedings not inconsistent herewith.

Chelf, for appellant.

James, Towles, for appellees.

HIRSCH, FLEXNER & Co. v. W. M. BOURNE, & Co.**Executions—Levy—Priority.**

Two execution creditors levied on and sold the same property of defendant Bourne. Appellant creditor, filed suit, charging improper motives, etc., of the other execution creditor. On motion of defendant, the sale under execution of appellant was set aside, April 6, 1869, and the sale under the execution of the other creditor was set aside April 14, 1869. Appellants filed an amended petition alleging that by virtue of their said levy, they acquired a lien on the property. The other creditor, Bourne, denying this lien by answer, set forth claim by virtue of levy of execution on same property at a different time, for another and different debt. Held under, volume 1, Sess. Acts 1867-8, p. 18, amending section 1, art. 16, ch. 36, Rev. St., appellant's lien, acquired by his levy, was not affected by the quashal of the sale thereunder.

APPEAL FROM HENRY CIRCUIT COURT.

February 7, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

Appellants having an execution against the estate of appellee,

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Rowlett, and the same having been levied on a lot of ground on which a saw-mill was located and on another lot and warehouse, at the sale thereof by the sheriff, became the purchasers, and appellee, Bourne, also having a judgment and execution against Rowlett, his execution was levied on the same property, and it was sold under his execution when he also became the purchaser thereof.

The petition in this case was filed by appellants on the 1st of December, 1868, against Bourne and Rowlett, setting out the foregoing facts, and also charging that the judgment upon which Bourne's execution issued was for \$1,250, with interest from the 23d of August, 1864, credited by \$1,340, of date January 4th, 1867, and that the credit for said sum was entered on the execution when it issued on said judgment, that after it was placed in the hands of the sheriff thus credited the plaintiff and defendant therein, with the fraudulent intent to prefer the plaintiff and to prevent appellants from making their debts, Rowlett being insolvent, took the execution from the sheriff and erased the credit therefrom, and when the property was sold under said *fi fa* Bourne claimed that the amount bid and paid by him therefor was the \$1,250, with interest from the 23d of August, 1864, and costs without any credit. Appellants charge that the erasure was made by the parties to give to Bourne an unlawful advantage and to defraud them. They pray that the incumbrance thrown on the property by the fraudulent conduct of Bourne and Rowlett may be removed, and that the title and possession of the property be adjudged to them. The erasure of the credit from the execution is admitted by appellees, but they deny that it was done by them, and say the attorney of Bourne did it without the authority to do so from either of them, and deny that it was done with any improper motive or purpose.

On the 6th of April, 1869, on motion of Rowlett, and on grounds set forth in his notice to appellants of said motion, the sale under their execution was adjudged invalid, and was set aside by the Henry circuit court. And on the 14th of the same month, the court, on motion of Rowlett against Bourne, quashed Bourne's execution, and the sale made of said lots under and by virtue of said execution.

After this was done appellants amended their petition, alleging the foregoing facts, that by virtue of the levy of their execution they had acquired a lien on the property for their debt, and pray

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that the same may be subjected and that their lien be adjudged prior to any that Bourne might attempt to assert.

Bourne answered the amended petition; denied that appellants had any lien on the property, and then asserted claim to it by virtue of a levy of an execution issued on another judgment in his favor against Rowlett, it being different from the one on which the former execution issued, and a sale of the same under said execution after the former execution and sale had been quashed.

On final hearing the court below dismissed appellants' petition, and they have appealed to this court.

We are satisfied that under the act approved February 18, 1868, entitled An Act to amend section 1, article 16, chapter 36, of the Revised Statutes, appellants' lien on the property acquired by virtue of the levy of their execution was not affected by the quashal of the sale thereunder, but the same was effectual to secure the lien. *1 Volume Sess. Acts, 1867-8, page 18.*

And although appellants had a right under said act to issue their *vinditioni exponas*, still, as Appellee Bourne's claim was an impediment when they filed their original petition, which they had a right to have removed, they could properly appeal to the chancellor to remove it, and being in that court the chancellor should have proceeded to settle the conflicting claims on equitable principles.

From the foregoing view it is obvious that whatever right Bourne may have acquired by the levy of his amended execution it was subordinate to the prior lien of appellants, and should yield to it.

Wherefore, the judgment must be reversed and the cause remanded, with directions to the court below to order a sale of so much of the lots with the improvements in Lockport on which appellants' execution was levied by the sheriff of Henry county, and which were sold by him, the sale to be made according to chancery rules, and the same reported to the court.

Affirmed on the cross-appeal.

The CHIEF JUSTICE did not sit.

Webb & Barbour, for appellants.

Drane, for appellee.

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BEN F. FOREMAN v. HOPE INS. CO.

Appeals—Rule—New Pleading.

In the lower court, appellant treated the rule of the chancery court as a petition. No objection to this character of proceeding was made, but filed an answer going to the merits of the case. Held that under the fifth section of Act March 21, 1870, a litigant who had actually appeared in court, and by his conduct induced the chancellor and the opposite party to believe that he intended to waive all formal defects, or omissions, can not be allowed, after he is defeated upon the merits of the controversy, to take advantage of the technical objections for the first time in the appellate court.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY BRANCH.

April 25, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

From the record presented to us by the appellant, we must presume that he was a resident of Jefferson county at the time proceeding by rule were instituted against him.

He does not plead to the jurisdiction of the Louisville chancery court, nor is there any fact presented by the record which shows that he was a resident of any other than the county of Jefferson at that time. The judgment appealed from can not, therefore, be regarded as void.

In the court below appellant treated the rule of the chancery court as a petition. He made no objection to the character of proceedings resorted to by appellee, but filed an answer going to the merits of the case and willingly submitted the issues raised by his answer to the chancellor for adjudication.

The chancellor did not err in holding that the *onus* was upon appellant to establish by proof his plea of failure or want of consideration for the note, upon which judgment was asked. Littell 206; 6 John J. Marshall 132, 3 B. Monroe 418.

The note itself gave to appellee a *prima facie* right of recovery, and in the absence of all proof the chancellor could not refuse to render judgment thereon.

We are of opinion that appellant can not in this case avail him-

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self of the exceptions filed in this court to proceedings had in the court below. The extraordinary privileges conferred upon certain litigants by the fifth section of the act of March 21st. 1870, ought not to be extended to any other than cases coming closely within the spirit of such act. The Legislature certainly did not intend that a party who had actually appeared in court, and by his conduct induced the chancellor and the opposite party to believe that he intended to waive all formal defects, or omissions, should be allowed after he was defeated upon the merits of the controversy, to take advantage of these technical objections for the first time in this court.

There may be some reason why a party proceeded against by rule, who did not appear, should be allowed this right, but there certainly can be none, in a case like this one under consideration, and we will not conclude that the Legislature intended, without good and sufficient reason, to overturn one of the best established rules of practice.

The appellant was in court in person, and might have presented to the chancellor every ground of objection or defense embodied in his exceptions here filed. Having failed to do so, he must be held to have waived each and all of them.

If it be conceded that the act of March 16th, 1869, repealing the charters of the Hope and Globe Insurance Companies be unconstitutional (a matter about which it is not necessary that we should express an opinion), such fact will not avail appellant for a reversal of the judgment from which he has appealed.

If such act be unconstitutional, it may be a good reason why the suit of Stevens vs. The Insurance Company should not be prosecuted, but it is no reason why Stevens owing premium notes to such company should not be compelled to pay them.

If the suit of Stevens had never been instituted, the Louisville chancery court would have had jurisdiction to give judgment against Foreman on the note held by the Insurance Company.

His creditor, the company, is not complaining that the note has been placed in the hands of a receiver for collection, and as it is a party to the suit in which the receiver was appointed and has so far as is shown by the record upon which we are called to act, acquiesced in such appointment, the judgment in favor of the receiver will be a bar to any subsequent action on the note by the company. The liability of Foreman to pay the note does not

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depend upon the constitutionality of the act in question, nor upon the propriety or impropriety, of the action of the chancellor in entering the suit of Stevens, or in the appointment of the receiver.

The record before us presents no sufficient reason why the judgment appealed from should be disturbed. It must, therefore, be affirmed.

Duke & Richards, for appellant.

J. G. Wilson, for appellee.

THOMAS ELDER, &C. v. DANIEL PROCISE.**Vendor and Purchaser—Rescission—Improvements.**

A purchaser from one holding lands in fee subject to be defeated upon his dying without issue, buys in good faith and is entitled to recover improvements just the amount the land was enhanced in value at the date of suit of the heirs, he being liable for rent, beginning at the same time.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY BRANCH.

February 29, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

There can be no question that Hiram Tucker took, under the will of his father, the fee in the land sued for, subject to be defeated by his dying without issue, and upon the happening of that event the title to the 132 acres of land vested in his surviving brothers and sisters.

But appellee, the vendee of Hiram Tucker, paid the full value of the land, and doubtless put the improvements on it in good faith, believing at the time that the land was his, he had the deed of his vender with a covenant of general warranty. And having made the improvements in good faith, appellee was entitled to be paid for them, just the amount the land was enhanced in value at the time the suit was brought, he being liable for rent beginning at the same time.

Appellants are to be charged with the value of the estate each received as heirs of Hiram Tucker, that value to be estimated at the time of his death, which is \$4,400 in all, but in estimating the

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value of that inheritance, the value of the dower right of the widow of decedent should be deducted. Certainly their inheritance from their brother of the 51 acres and odd poles of land was the worth of each one's portion subject to the dower interest of the widow of their brother therein, and they should not be charged more than the land they inherited was actually worth at the time, and its cash value, to be ascertained by means of annuity tables, taking into consideration the age and health of the widow, and that should be deducted.

Appellants are not entitled to any allowance for the stable that was burned on the 132 acres of land, as it was not burned by any fault of appellee.

It does not appear from the report of the master that the improvements put on the land were charged to appellant at their original cost, or whether he estimated them at the time he made his report—but neither aspect presents the case according to the rights of the parties. Appellee is only entitled to be allowed for the improvements made by him just the amount they enhanced or added to the value of the land at the time the suit was brought.

Wherefore, the judgment is *reversed*, and the cause is remanded, with directions that further proceedings be had not inconsistent herewith. And it may be proper to add that the judgment for the sale of appellants' interests in the land is also reversed, and the sale is set aside.

James Harrison, for appellants.

Barnett, for appellee.

W. A. GRAVES v. HERCULES W. WELLER.**Assault and Battery—Evidence—Witnesses—Proper Question.**

In an action for assault, the following question was submitted in justification: "Was there any agreement between your mother and plaintiff, when she consented to send you to school to plaintiff, as to whether he was to whip you or not." Held not competent evidence, as it is not stated the alleged promise was made at the time the contract was made to send the daughter to school, or that it constituted any part of the contract.

Same—Instructions.

An instruction, "That if the assault made by appellant, arose from

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the heat of blood caused by the whipping of his child in violation of the agreement made between the parties when said child was sent to school, etc.," and qualified by "provided the jury believed that there was not time enough between the hour at which defendant was informed of the whipping of his child, and the time the assault was committed to enable defendant's blood to cool," and by omitting the words "In violation of the agreement made," etc., held properly refused as the fact that the whipping was done in violation of the agreement is there to be assumed by the court, and taken from the consideration of the jury.

APPEAL FROM NELSON CIRCUIT COURT.

December 19, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought by appellee against appellant for assaulting and beating him. The defense was, not guilty, and a verdict and judgment having been rendered for \$1,000 in favor of appellee, and appellant's motion for a new trial having been overruled he has appealed.

He complains, first, that the court below erred in refusing to permit Miss Evans, who had been the pupil of appellee, and for the chastising of whom, while at school, the difficulty arose, answer the following questions:

Was there any agreement between your mother and plaintiff, Weller, when she consented to send you to school to plaintiff as to whether he was to whip you or not? The answer to which, as was then avowed, would have been, that her mother told him that she would not send her daughter to his school, unless he would agree that he would not whip her, and that plaintiff promised her mother he would not whip her.

It is not stated or pretended that the alleged promise was made at the time the contract was made by the father with appellee to send his daughter to the school, or that it constituted any part of the contract, nor that the appellant knew or approved of such a promise, consequently, it was not competent evidence of provocation.

The instructions given on the motion of appellee were not *objected* to, at the time they were offered, and a mere exception to the giving them without an objection when they were offered is not sufficient to authorize this court to review the action of the court below as has been often ruled.

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Under the pleadings, instruction No. 1, as asked by appellant, was properly refused.

By instruction No. 2 the court was asked to tell the jury without qualification that if the assault made by appellant on appellee arose from the heat of blood caused by the whipping of his child in violation of the agreement made between the parties when said child was sent to school though it should not entirely excuse him, it might be considered by them in mitigation of damages. That instruction was given with the qualification, that provided the jury believed that there was not time enough between the hour at which defendant was informed of the whipping of said child by plaintiff, and the time the assault was committed to enable defendant's blood to cool, and by omitting the words "in violation of" the agreement made between the parties when said child was sent to school."

This instruction as asked was properly refused, because *the fact* that the whipping was done in violation of the agreement is there to be assumed by the court, and taken entirely from the consideration of the jury, and which was a very material fact as presented in that instruction.

Instruction No. 3, given by the court in place of No. 2, was quite as favorable to appellant as he was entitled to have it.

We are, therefore, unable to perceive any available error prejudicial to appellant, and the judgment must be *affirmed*.

A. H. Field, for appellant.

Knott, Muir & W., for appellee.

ANN B. NEVITT'S ADMR. v. L. P. CHANDEON.**Administrator De Bonis Non—Who to Sue.**

An action for devastavit against an administrator can only be brought by the distributees, and not by the administrator de bonis non.

APPEAL FROM LARUE CIRCUIT COURT.

January 4, 1872.

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OPINION OF THE COURT BY JUDGE PETERS:

This suit was brought by appellant, administrator de bonis non of Ann B. Nevitt, deceased, against Bray, as former executor of Mrs. Nevitt, and Price and appellant as sureties of Bray in his executorial bond. Judgment was rendered against Bray and Price, who made no defense, and the petition dismissed as to appellee, who defended the suit, and appellants seeks to reverse the judgment in favor of appellee.

In the case of *Felts, &c., vs. Brown's Admr.*, 3 J. J. Mar. 147, this court held that the right to recover for the assets which came to the hands of the first administrator, and were wasted by him, was in the distributees, and not in the administrator *de bonis non*, and *Graves, &c., vs. Downey*, 3 Mon. 355, the same question is settled. Appellant's petition was therefore properly dismissed. But whether appellee may or not ultimately be responsible to the devisees of the testatrix is not now legitimately before us. And we need not anticipate it.

Judgment affirmed.

Howell, for appellant.

Rodman, for appellee.

J. F. STEPHENSON v. J. A. LISHY & Co.**Attachment—Removal from State**

Acts in selling property, household goods, sufficient to authorize attachment. Exemptions not allowed.

APPEAL FROM CLINTON CIRCUIT COURT.

September 26, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The preponderance of the evidence in this case is clearly in favor of the proposition that the appellee, J. F. Stephenson, had before the institution of this suit ceased to be a resident house-keeper of this State. It may be possible that he intended to

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return from Missouri to Clinton county after making a crop in that State, and that he contemplated the possibility of returning to Kentucky to live in case his wife was not pleased with, or failed to enjoy good health, in the west, but his actions before leaving Kentucky in selling off his household property, and conveying his house and lot to his brother tend to show that his principal object in leaving was to acquire a new home. The court therefore did not err in disallowing his claim to the exemption of the house and lot as a homestead. It is a matter of no consequence whether the levy of appellees' execution created a lien or not. The deed from J. F. to T. V. Stephenson, which was absolute upon its face, though in point of fact a mortgage, obstructed the appellee in the enforcement of his legal remedies, and he, therefore, had the right to go to equity to be relieved against said deed. Although this proceeding is not literally to enforce a lien created by the levy of an order of attachment, still we are of opinion that the judgment of the court should have fixed the place for the sale of the real estate, and at least required the commissioner to make the same on the first day of some county or circuit court. For this error the judgment is reversed. The cause is remanded for further proceedings consistent herewith.

Butler & Brent, for appellant.

Winfrey, for appellee.

ELIHU PRICE v. RALEIGH KENDALL'S EXOR.

Interest—Usury—Acts Condemning Charge of—When Defense May not be Made.

APPEAL FROM FLEMING CIRCUIT COURT.

February 1, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

From the evidence it is clear that a very considerable portion of the original indebtedness of Myers to Kendall was composed of usurious interest. It seems, however, that in a transaction between Myers and Elihu Price, the latter, for a valuable consid-

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eration, assumed to pay the entire amount of the indebtedness to Kendall, and that the note upon which the judgment in this action was rendered was executed in pursuance of that agreement and in lieu of those held by Kendall on Myers. It is proven by Myers, who is the witness of the appellant, that he neither authorized nor requested them to defend their note upon the ground that Kendall had exacted usurious interest from him. As Myers nor Kendall have exacted such interest from the appellant it is difficult to perceive any ground upon which their attempted defense can be sustained. The judgment of the circuit court must be affirmed.

Cord, for appellant.

Andrews, for appellee.

C. A. CHAPLIN v. JAMES R. HEWLETT.

Attorney—County Attorney—Fees Out of Fines Recovered—Amount Entitled to.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

November 2, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The precise question involved in this appeal came before this court in *Stone vs. Riddle*, 5 Bush 349, and it was held in that case that as the county attorney prosecuted the accused, and had his recognizance taken, which was forfeited, and the default occurred before the enactment of "*February 21, 1868, 1 Sess. Acts 23*," but that the judgment thereon was subsequent thereto, and the county attorney having aided in recovering it in the circuit court, he was entitled to fifteen of the thirty per cent. allowed by previous enactment to Commonwealth attorneys. The appellant was, therefore entitled to fifteen of the thirty per cent. collected by appellee. Wherefore, the judgment is reversed, and the cause is remanded for further proceedings consistent herewith.

McPherson, Ritter, for appellant.

Hewlett, for appellee.

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JOHN SAWTELL v. W. R. ENGLISH, &c.

Boundaries—Division Line—Agreed Division.

A compromise line, used by both claimants, held, best evidence of boundary.

APPEAL FROM HARDIN CIRCUIT COURT.

February 22, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

Denton Geohagen, owning a large tract of land, brought from Thomas Lewis one hundred acres adjoining thereto, and Benjamin Singleton, owning another neighboring tract, also bought from Lewis the same tract. Each party having improved different portions of the 100 acres, to compromise the conflict of title, they agreed in writing, in 1835, to divide that tract between them by a convenient line, each conceding the right to the portion then allotted to the other. The written memorial of compromise, in defining the division line, calls to run, from one of the points to *another*, north 72 degrees west, and this is the line from F. to G. as designated on the plat, page 76, of the record, and it allotted to D. Geohagen the triangle F. G. R., as shown on the same plat, containing about 16 acres, the principal subject of this controversy, the appellee claiming that F. R. and not F. G. is the true compromise line, and that S. 85 W., instead of N. 72 W., was the true course.

The writing itself, sufficient proof without other evidence, is corroborated by the fact that each party has improved and occupied correspondingly with the line and course described in the writing.

In afterwards conveying *all that he owned* to his son, Thomas, Denton Geohagen called for the wrong line which would not include the triangle, and Thomas Geohagen's conveyance of all he got from his father recites the same line. But the written compromise and the confirmatory occupancy and improving sufficiently show the mistake.

We are satisfied that the line N. 72 W. from F. to G. is the

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true compromise line and that neither the appellee nor his vendor, Singleton, ever had title to, or improved, or occupied any portion of the triangle, and that it rightfully belongs, by both grant and occupancy, to the appellant.

The circuit court, therefore, erred in adjudging it to the appellee.

Wherefore, the judgment is reversed and the cause remanded, with instructions to adjudge to the appellant the 16 acres included in the triangle and also \$32 for difference in exchange of lands between the parties.

Wintersmith, for appellant.

Cofer, for appellees.

JAMES LYNCH & BONETT v. MARTIN SHERLOCK.

Work and Labor—Inconsistency of Pleading.

New trial should be granted on, when shown.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 29, 1869.

OPINION OF THE COURT BY JUDGE WILLIAMS:

Although the affiants, Spect and Miles, testified before the court for the plaintiff upon the trial, the important facts stated in Miles' affidavit were not communicated to appellants until after the judgment was rendered.

The fact that the work spoken of by Miles was not set up in the original petition, but in an amendment filed a few days after the original and before the work could possibly have been done after bringing the original suit, and it being for a larger sum than sought to be recovered in the first petition, renders the facts stated by Miles highly probable, and if these be true there is no doubt but Sherlock recovered a larger amount than he is entitled to, and this secured by his own improper conduct.

The refusal of a new trial was erroneous, wherefore the judg-

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ment is reversed, with directions for a new trial and further proceedings.

George R. Fearons, T. F. Hallam, for appellants.
Hawkins, for appellee.

JOHN G. SMITH v. WILLIAM SMITH.

Contracts—Payment in Fluctuating Commodity.

Entering into contract freely and voluntarily can not avoid same.

APPEAL FROM GRANT CIRCUIT COURT.

September 16, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Appellee had the unquestioned right to demand that the residue of the note unpaid should be paid in gold or silver. The treasury notes, as we judicially know, were not at the time of par value with gold and silver; but their value was fluctuating, and like any other vendible commodity their value was conventional, or parties could negotiate for and deal in it, or pay and receive it in payment of debts at such values as they might agree upon. And contracts in regard to them, fairly entered into and free from fraud, must be enforced. The contract between these parties, out of which appellant's indebtedness grew and the notes were executed before the treasury notes had an existence. And having entered into the contract of which he now complains, freely and voluntarily, he has shown no sufficient legal reason for avoiding it.

Wherefore, the judgment is affirmed.

Drane, for appellant.
Smith, for appellee.

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MARY S. YANTIS ET AL. v. B. F. DUNCAN'S ADMR. ET AL.

Fraudulent Conveyance—Parent to Child.

Deed to daughter held fraudulent.

May 10, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The two deeds under which Mrs. Yantis claims the property adjudged by the court to be sold in satisfaction of appellees' judgment, present upon their faces intrinsic evidence that her father is the real owner of the property, and that her name is only being used to protect him in the enjoyment of the same. In addition to this, the proof in the case, even that of the father himself, when considered in connection with the evasive and unsatisfactory answer of Mrs. Yantis and husband, can leave no doubt but that the father caused the lots to be conveyed to his daughter for the fraudulent purpose of protecting it from his creditors.

Judgment affirmed.

Dunlap, Durham & Jacobs, for appellant.

McKee, VanWinkle, for appellee.

L. D. DANIEL v. JULIA CASSELL, &C.

Adverse Possession.

Record of holding, as manifested by court proceedings. Prior right.

APPEAL FROM CAMPBELL CIRCUIT COURT.

May 16, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The only defense made to the suit by appellant was an adversary

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holding of over fifteen years, which he utterly failed to make out by the proof.

The recovery of the land by Mrs. Cassell of G. Daniel, &c., the persons then in possession, is manifested by the record and proceedings of that action filed in this case, and read as evidence without objection in the court below. And it is very clear from the evidence that after the recovery in that action, appellees, and their ancestor were in the possession by their tenants before appellant entered, and that his subsequent entry was without right, and tortuous.

We perceive no error prejudicial to appellant, and the judgment must be *affirmed*.

Hallam, for appellant.

Menzies & F., for appellee.

JOSEPH CLOYD v. WM. P. WILLIAMS' ADMR.

Judgment—Final—Appeal—When Court Retains Control of Case, Before Final Adjudication—Power to Complete Settlement of Estate, After Master's Report Filed.

APPEAL FROM MERCER CIRCUIT COURT.

October 13, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

We do not regard the judgment of the circuit court, rendered October 24th, 1863, as such a final judgment as deprived the court of the power to complete the settlement of the estate of the intestate. It was only final so far as it confirmed the master's report and directed the judgment of certain amounts upon certain enumerated claims. The master's report shows upon its face that assets of the estate of the intestate still remained uncollected, and it was proper for the court to retain control of all questions that could properly arise in such proceedings between the creditors, heirs and personal representative of the intestate.

Wherefore, the judgment of July 21st, 1868, is reversed, and the

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cause remanded, with instructions to complete the adjudication of all issues properly before the court.

Thompson, for appellant.

James, Hardin & Hardin, for appellee.

JAS. L. ANDERSON, &C., v. N. D. HAMPTON, &C.

Appeal from County Court in all Proceedings for Division of Lands—Does not Lie to Court of Appeals.

APPEAL FROM LIVINGSTON CIRCUIT COURT.

October 27, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

In the case of Clark vs. Lusk, 1 Metcalfe 447, it was held that an appeal would lie to this court from the judgment of a county court, in cases in which the same might have been prosecuted to the circuit court of the county. Section 20, Civil Code, authorizes appeals to the circuit court from the judgment of county courts in all proceedings for the division of lands and slaves. This appeal should have been prosecuted to the Livingston circuit court, and hence we have no jurisdiction of the same. The appeal must therefore be dismissed.

Bush & Bush, for appellant.

Greer, for appellee.

Opinion of the Court.

JOHN H. BLAND v. JAMES MARIOT, &C.

Vendor and Purchaser—Purchaser Must Look to Immediate Vendor on Warranty—Notice of Balance of Purchase Money Due.

APPEAL FROM HARDIN CIRCUIT COURT.

October 22, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

When appellant purchased the house and lot from Oldridge, he knew the title to the same was in Mariot & Snyder, and that four hundred dollars of the purchase money were unpaid to them. There is no evidence that they owed any partnership or joint debts, and appellant knew Mariot refused to bind himself in any way for a title to the property until he got his part of the purchase money remaining unpaid, and for which it was bound. If any consideration passed from appellant and any one is bound to him for a breach of the contract, it is Snyder, and to him he must look.

As the answer of appellant presented no bar to a recovery by Mariot, the court below committed no error in rendering the judgment in his favor, and continuing the case as between appellant and Snyder.

Wherefore, the judgment is *affirmed*.

Wilson & Wilson, for appellant.

Cofer & Marriott, for appellee.

Opinion of the Court.

W. H. BEAZLEY v. A. J. MERSHON.

Judicial Sales—Stare Decisis—Former Appeals—Demurrer Properly Sustained.

APPEAL FROM GARRARD CIRCUIT COURT.

December 15, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Deeming it unnecessary to enter upon a history of this protracted litigation it may be sufficient to state that after several appeals had been prosecuted from the original judgment, and subsequent final orders, and the sale of the real estate which is the subject of this controversy, had several times been recognized by this court as valid,

First, on the appeal prosecuted from the original judgment, this court, in the opinion then delivered, expressly stated that the reversal of the judgments in the consolidated cases would not avoid the sales.

Second, in an opinion delivered in the case in April, 1866, it is said that the court below, in refusing to permit appellant to file an answer tendered by him, which opened the whole case as to the sale, and opened it for litigation *in personam*, instead of *in rem*, and should the appellant finally succeed in quashing the attachment, or *defeating the claims of any* of the other creditors to any extent, *the sales standing*, his remedy *pro tanto* may be on the bonds of the defeated appellees. 1 Bush 466.

Again, last January, the question presented by this appeal was before this court on a motion to file a pleading in the nature of a bill of review, substantially the same as the one now under consideration, and in the opinion of the court then delivered, it is said, by *section 579, Civil Code*, the court in which a judgment, or final order, has been rendered, or made, shall have power, after the expiration of the term, to vacate or modify such judgment or order *for eight* specific causes, which fully embrace every cause for a bill of review. 6 Bush.

This ruling is in conformity with *Anderson vs. Anderson* 18 B.

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Mon. 97; McLean vs. Gixan, Ib. 774; Hocker, &c., vs. Gentry, 3 Met. 463, McManama vs. Garnett, Ib. 517.

It is manifest from an examination of the pleading in this case that none of the causes for which a judgment can be vacated or modified, as prescribed in *section 579* of Civil Code, are embraced in it, consequently the demurrer was properly sustained to it by the court below.

If appellant had resorted to the remedy suggested in the opinion in *1 Bush, supra*, a redress of the grievances complained of, to some extent at least might before this have been obtained. Be that, however, as it may the courts have no power over the former judgments complained of, nor to give relief in the mode herein sought.

Wherefore, the judgment of the court below sustaining appellee's demurrer, dismissing the petition and awarding to appellee a writ of possession is affirmed.

Owsley & Burdell, Bradley, for appellant.

Dunlap, for appellee.

JOHN G. BRAWNER v. JAMES BOTTON.

Quieting Title—Vendor and Purchaser—Accountable for Rents.

If improvements are made by a party in possession of lands, under the belief that he was the owner, by reason of a valid, legal or equitable claim, the foundation of which was of public record, he is entitled, on eviction, to his improvements, measured by the increase in the vendible value of the land, when recovered, arising from the improvements; but in no event to exceed the consequent enhancement of the value, beyond the rent, waste and deterioration.

Same.

An exhibition of a claimant, of a deed, never recorded, and the consideration not appearing to have been paid, does not invest him with title nor to impress the belief to that effect, does not entitle him to claim improvements, under the statute.

APPEAL FROM M'LEAN CIRCUIT COURT.

December 7, 1870.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE HARDIN:

A writ of possession in favor of Joseph Burnett having been awarded by the McLean circuit court to put him in possession of a tract of about 108 acres of land, purchased by him at a decretal sale in a judicial proceeding to which the appellants, John G. Brawner and others, appear to have been parties, the appellee, James Botton, the tenant in possession and claiming the land under a conveyance purporting to have been made to him by W. W. Brawner, as commissioner, in another suit in the same court in 1860, brought this suit in equity for enjoining the execution of said writ, or, failing in that object, to have an account of his improvements, made on the land, taken and set off against his liability for rents, and to recover a balance which he claimed as due him on that basis, in the event of eviction, and to have a lien on the land adjudged in his favor and enforced for its payment.

The appellants controverted his claim to the relief sought in either aspect, and in the progress of the cause, the injunction was dissolved. Afterwards, upon a report of a commissioner, and proof taken by him as to improvements and rents, the court adopting the commissioner's estimate of the improvements at \$950, and rents at \$780, inaccurately assumed that a balance of \$150 was due to the plaintiff on this basis for which there was a lien on the land, and directed that so much of the land be sold as necessary for its payment, together with the plaintiff's costs; and from that judgment the defendants have appealed, and the appellee has prayed a cross-appeal.

The record of the suit in which the writ of habere facias was awarded does not appear to have been exhibited, but as the petition admitted the judgment for possession, and the plaintiff, though exhibiting the unrecorded deed of W. W. Brawner, and an apparently imperfect transcript of a suit in which he attempted to convey the land, but without legal authority to do so, failed to show any valid title in himself through the conveyance or otherwise, the injunction was properly dissolved. We are also of opinion that there is no available ground for reversing the final judgment on the cross-appeal. But on the contrary, the court erred to the prejudice of the appellants. If the improvements were made by the appellee under the belief that he was the owner of the land by reason of a valid, legal, or equitable claim, the foundation of which was of

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public record, he was entitled to compensation for the value of his improvements upon the land at the time of his eviction, according to section 1 of the first article of chapter 70 of the Revised Statutes. But in such a case the value of the improvements should not have been estimated according to their original cost, but should have been measured by the increase in the vendible value of the land, when recovered, arising from the improvements (Thomas vs. Thomas' Exor., 16 B. Monroe 420); and in no event should the liability of the appellants to account for the improvements have exceeded the consequent enhancement of the value of the land beyond the liability of the appellee to account for rents, waste and deterioration of the land. According to the weight of the evidence, the improvements, if estimated on this basis, added nothing to the vendible value of the lands, which, in the opinion of several of the witnesses, would have sold for as much in the condition it was in when the appellee took possession, as in that in which he left it, except that its value may have increased in consequence of the general rise in the value of land. If this be so, it is not material to inquire whether the claim of the appellee was such as to exempt from accountability to the appellants for rents, before the assertion of their claim; nor whether the character of his claim and its foundation were such as to entitle him to the benefit of the statute referred to. But it may be observed, that as it is manifest from the meager exhibition made by the appellee himself of the proceedings of the suit under which W. W. Brawner attempted to sell and convey the land, that his deed which was never recorded, and the consideration of which does not appear to have been paid, neither invested the appellee with the title, nor was such as reasonably to impress him with the belief that it could have that effect, he was not entitled to the benefit of the provisions of the statute.

It results that the appellee was not entitled to the relief sought by his petition in either aspect of the case.

The judgment in his favor is, therefore, reversed, and the cause remanded with instructions to dismiss the petition.

Owen & Gates, for appellants.

Tanner, for appellee.

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MENZIES & FINNELL v. W. W. WILLIAMS, &C.

Municipalities—Street—Improvements.

Where an owner of property, has stood by, and saw a city council act on a declaration of a greater number of owners, for street improvement, by doing the work and improving the property, he can not be permitted to refuse payment therefor.

APPEAL FROM KENTON CIRCUIT COURT.

May 17, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

It is distinctly alleged in the petition that the city council passed the ordinance for improving Garrard street, between North and Seventh streets, in said city, etc., setting forth, specifying the manner in which said improvements were to be made, in accordance with its charter, requiring the work to be let to the lowest bidder, after being properly advertised, and that appellee being the lowest bidder the contract for the work was awarded to him, etc., etc. And it is alleged that the persons owning the larger portion of the ground fronting the improvement, petitioned the council to make the order for the improvement, and from an exhibit filed September 16th, 1870, it appears that appellant signed the petition, which fact is charged and not denied, but appellants do deny that the owners of a majority of feet fronting said improvement signed the petition. And then they allege that the price paid for the improvement is excessive. These are all the issues presented by the pleadings.

As to whether the owners of the greater number of feet fronting said improvement petitioned in writing for the improvement, we deem immaterial, because it is alleged in the petition and shown that the appellants asserted to the council that the owners of a majority of feet had petitioned, and they can not after the city council acted on that declaration and they stood by and saw the work done and their property improved, be permitted to deny what they have asserted to be true, thereby induced others to expend money and labor.

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If the price paid for the work done was so excessive as to amount to a fraud, the owners of lots would not be bound to pay it. But that is affirmative matter, of which there is no evidence, and this court does not judicially know that the price paid was so high as to amount to a fraud.

The judgment must, therefore, be *affirmed*.

Menzies & Furber, for appellant.

Fisks, for appellee.

MARY McCORMAC v. W. J. McCORMAC.**Divorce—Duty of Wife.**

A wife is not entitled arbitrarily to insist on a husband selecting as a home, one that is distasteful to him, and a refusal of a husband to so select, and live with the wife, is not grounds for a divorce.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

February 14, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

While appellant's conduct during the short period that they lived together was in every respect correct, and that of appellee, on the 13th of November, 1868, was unkind, violent, and wholly without cause, or even slight provocation on her part, still, as he very soon thereafter, perhaps the very next day, sent an apology for his misbehavior and offered to provide a comfortable, respectable home for her, if she would share it with him, and as he was bound to provide the home, it was proper for her to have gone, and made an effort by a continuation of that blameless conduct which had marked her short married life, to win his highest regard, and smooth the path, upon which they had just entered, as they doubtless hoped in the start to travel through life together. The violence of his conduct on the evening of the 13th of November, 1868, within two weeks after their marriage, was such as to excite justly her apprehension of future domestic troubles. But as it was the husband's duty to provide her future home, appellant could not consistently insist on his selecting one that was dissatis-

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factory to him. And as he offered to provide one that should be comfortable and not disagreeable to her, she could have gone with him, and endeavored to make it bright to him and happy to her. We do not see that appellant has brought herself within any of the provisions of the statute entitling her to a divorce.

Wherefore, the judgment is affirmed.

Harris, for appellant.

Elliott, for appellee.

R. M. MOSBY, ASSIGNEE, ETC., v. WM. HOWELL.

Mortgages—Assignee in Bankruptcy a Party to Foreclosure.

An assignee in bankruptcy can not make himself a party to a proceeding to foreclose a mortgage executed by the bankrupt, after judgment of foreclosure has been rendered.

APPEAL FROM LARUE CIRCUIT COURT.

January 4, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

On the 27th of September, 1871, appellant, as assignee in bankruptcy of H. S. Johnson, presented his petition, and moved the court below for reasons stated in said petition to be made a defendant in the suit of William Howell, etc., against said Johnson, etc., brought, as it appears from the petition, by the plaintiff below, against Johnson to foreclose a mortgage executed by the latter to the former. The court below overruled the motion, and to reverse the order overruling said motion this appeal is prosecuted. A transcript of the record and proceedings in the case are not presented to this court.

But from the petition it appears that a final judgment foreclosing the mortgage, and ordering a sale of the mortgaged property had been rendered in April, 1871, at a term of the court preceding the one at which the petition was filed and the motion made. Johnson was a party to that suit and may have presented

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all the matters of defense relied on in the petition of appellant from anything that appears in the record. And if he did not, no reason is shown for his failure to do so.

Besides, appellant had become the assignee in bankruptcy of Johnson before the final judgment was rendered in the case, and no sufficient excuse is offered for not presenting the petition and making the motion before the rendition of said judgment. It is not shown in the petition that appellant was a necessary party.

After judgment the court had no power to set it aside, or modify it, unless upon grounds discovered after the trial. And no such discovery is alleged in the petition.

Wherefore, the judgment is *affirmed*.

Lee & Rodman, for appellant.

Howell, for appellee.

M. E. McCAULEY v. BETTIE WOOD, &c.

Infants—Contracts by Parent for Board and Tuition.

Where a mother, in her lifetime, contracted with a third party for board and tuition of her children, that contract can only be enforced against the parent and not against the separate estate of the infants.

APPEAL FROM MARION CIRCUIT COURT.

December 16, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

The proof in this case shows a special contract made by the mother of the infants in regard to their board and tuition with the appellant. The mother at the time she made this contract was a feme covert. The husband of Mrs. Wood and father of the children who are sued is still living. One of the alleged causes for reversal, is the refusal of the court to permit an amended pleading filed, by which the mother's property is sought to be made liable. This question can not now be made, as the appellant, of her own motion, dismissed the case as against Mrs. Wood, and there is no suit pending against her. The court below should have dismissed the suit as against the appellees. They were both infants

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when the debt was contracted. The proof shows that the contract was made by the mother, and that the father is alive, and we do not well see how an action at law can be maintained against the children upon such a state of fact; nor does the amended petitions offered to be filed present any better cause of action as against them. There are causes where a court of equity has subjected the estate of an infant, or rather the income of an estate, for boarding and schooling the infant, where the mother and father were both insolvent, and the income of the infants were amply sufficient to pay, etc. We see no reason for disturbing the judgment of the court below. Judgment affirmed.

Russell & Arvitt, for appellant.

R. & F., for appellees.

GEORGE V. MORRIS *v.* HAYNER & DUNLEVY,
AND
W. O. PHILLIPS *v.* SAME.

Bailment—Sale.

Where money is to be paid, and the identical thing in an altered form is not to be restored but merely pledged as a security for the money, such a contract is a sale, and not a bailment.

Same—Lien for Advancement.

A contract, "To put to M.'s credit with a transfer thereof, a quantity of the whiskey produced therefrom, free from taxes, etc., an amount of whiskey ample to pay and reimburse said M. for said grant, and he to have a lien upon the whiskey so produced, etc.," held to convey merely a lien upon the whiskey to secure the payment of the agreed price of the grain furnished.

Same—Notice of Lien.

Without notice of this lien, purchasers of this whiskey would not be affected by any claims of M.

APPEAL FROM FLEMING CIRCUIT COURT.

January 16, 1872.

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OPINION OF THE COURT BY JUDGE LINDSAY:

The sale of the rye by Morris to Hayner & Dunlevy was perfect and complete. It was in no sense a bailment. The contract did not stipulate that Morris was to own any portion of the whiskey manufactured from such rye. Hayner & Dunlevy merely undertook "to put his (Morris) credit with a transfer thereof, and a warehouse receipt therefor, a quantity and portion of the whiskey produced therefrom, free from special taxes and all other charges and expenses an amount of whiskey ample to pay and reimburse said Morris for said grant, and he to have a lien upon the whiskey so produced therefrom to fully indemnify and save him harmless for said advance and grain so furnished."

The language of the contract makes it clear that Morris was not to own any part of such whiskey, but merely to hold a lien upon it to secure the payment of the price agreed to be paid for the rye, delivered to Hayner & Dunlevy.

We have been able to find no case in which a contract of this kind has been held a bailment. Where money is to be paid, and the identical thing in an altered form is not to be restored, but merely pledged as a security for the money, it would be dangerous and impolitic to hold such a contract to be a bailment instead of a sale. It is not shown that either of the persons purchasing portions of this whiskey had notice of the lien of Morris, hence it could not be enforced to their prejudice. Upon this branch of the case we think the judgment of the circuit court is clearly right. We also agree with the circuit judge that the sales of whiskey to the De Bees Tub & Cooperage Company, James Hayner & Darnell are not shown to have been made in contemplation of insolvency and to prefer them to the exclusion of other creditors.

At the time these sales were made the circumstances of Hayner & Dunlevy were such that it was possible for them to believe that they would be able to pay all their debts, and the evidence justifies the conclusion that their insolvency was the result of misfortune which prudent men might reasonably have hoped to avert. The statute of 1856 should not be so construed as to prevent persons indebted from attempting to relieve themselves from their embarrassments. The answer of James M. Hayner to the amended petition of Morris charging actual fraud is certainly as specifying as the charges in the amended petition. As to all the appellees

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except the firm of Hayner & Dunlevy, the judgment of the circuit court is affirmed.

Against that firm the appellant Morris was entitled to a judgment in personam for the amount of his claim. To this extent the judgment is reversed. Morris is entitled to his costs as against said firm. The remaining appellees are entitled to costs against appellants. The cause is remanded for the correction of the error indicated.

Cord, appellant.

Botts, for appellee.

MAY & DUDLEY v. THE OHIO FALLS CAR COMPANY.

Attachment—Garnishment—Appearance—Jurisdiction.

The mere presence of an officer of a foreign corporation in this State, casually, does not give a plaintiff a right of action, that a garnishment served on said officer for a debt due in Indiana, would be sufficient to give the court jurisdiction.

APPEAL FROM JEFFERSON CIRCUIT COURT, C. P. DIVISION.

April 30, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

This was an ordinary action, founded on a judgment of a court in Indiana, against Joseph J. Conway, a non-resident of this State, and only constructively before the court. Upon the affidavit of the plaintiff an order of attachment was issued, which was returned executed by delivering a copy to J. W. Sprague, the president of the Ohio Falls Car Company, a corporation located in, and created by the laws of Indiana, and which, it appears, was indebted to Conway, as one of its employes in the State of Indiana, Sprague being casually in Kentucky when served with a copy of said order.

The court of common pleas having, in effect, adjudged the service inoperative to bring the corporation within its jurisdiction, as a garnishee, the plaintiffs have appealed to this court. The jurisdiction of the court depending on the levy of the process on some property of Conway, or its service as to some debt owing to him in Kentucky, the essential question to be determined is

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whether the mere presence of one of the officers of the corporation in this State brought with him the right of Conway as against the corporation, or gave his debt any tangible existence or legal *situs* here. We are of the opinion that it did not.

The judgment is therefore affirmed.

G. V. Hawk & Son, for appellants.

Gibson & Son, for appellees.

C. W. NUCKOLS, &CO. v. MARY C. NUCKOLS.**Wills—Devise.**

A will examined and construed to give a son's wife and children certain property in fee, subject to payment of taxes and expenses accrued at the death of the testator.

APPEAL FROM WOODFORD CIRCUIT COURT.

January 10, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The construction of the fifth clause of the will of Samuel Nuckols is the only question presented in this controversy. This clause of the will is as follows: "In consequence of sundry amounts of money loaned, and paid out, for our son George L., and he to secure the same to me, did, deed a large number of lots, in the town of Faubant, in the State of Minnesota, to me, as the deeds now in my possession will show. Now, as I have charged to said George L., in my account book referred to, the amounts so loaned, and advanced to him, as so much of my estate, and for the same purpose I have received recently of William M. Butts of Memphis a deed for some seventy-five or eighty acres of land lying near Raleigh, Shelby county, Tennessee, it is my will and desire that my executor, hereinafter named, convey to Sarah C., wife of said George L., said lots in Faubant, Minnesota, and that he also convey said tract of land as named above in Tennessee to the trustee named above, for the use and benefit of the children of said George L. I here state that four of said lots in Faubant Minnesota, have been sold by me, and the proceeds paid over to said Sarah C. And

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I desire that any expenses or taxes, that may be due at my decease, be paid to my executor when he conveys the same to Sarah C. and her children." The devisor's son, George, seems to have been unfortunate in his business affairs, as the will recites, and his father mistrusting his ability to manage his portion of the estate or by reason of his pecuniary embarrassments, undertakes to secure to this son for his benefit, and that of his wife and children certain property. This property, which consists of one-fourth of his estate, after equalizing all the children by charging them with advancements made them, he devises to a trustee, to be held in trust for the use of his son, and his family, including his son's wife, and in no event to be made liable for his son's debts. This devise is contained in the third clause of the will. Now the devisor, after thus securing his son's family in this property, proceeds in the fifth clause of the will already quoted to devise the town lots in Minnesota and the Tennessee land. The town lots he devises specially and unconditionally to Mrs. Nuckols, his son's wife, in her own right and directs her executor to make her a conveyance, and in the disposition of the Tennessee land, he directs it conveyed to the trustee named in the third clause of the will for the benefit of his son's (George) children. After making these devises he proceeds to direct his executor, in the latter part of this fifth clause, what he must require of these devises, before he executes the conveyances, and *that is*, he must be paid what expenses and taxes has been paid out, on account of these lands, when he conveys the same to Sarah C. and her children. What he means by this direction to the executor (and it is a mere direction and not a devise) is, that he must require this payment of expenses, when he conveys the lots to Mrs. Nuckols, and the Tennessee land to the children. This construction of the will is fortified by an additional statement of the devisor to be found in the same clause, where he says he has sold four of the lots and paid to Sarah C. the proceeds, showing clearly his intention that she should be the sole owner of these lots. The judgment of the court below is affirmed.

Porter & Wallace, for appellants.

Thornton & Amsden, for appellee.

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THE BANK OF KENTUCKY AND OTHERS v. JAMES BRIGHT, &c.

Evidence—Burden of Proof—Action on Note.

Onus on one charging fraud, to establish same.

Creditors—Securing Claim.

When diligence in securing debt, not fraudulent as to ther creditors.

APPEAL FROM SHELBY CIRCUIT COURT.

May 18, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The note which Snook held against James Bright and which the latter admitted to be, not only genuine but unpaid, except as to five hundred dollars, established at least a *prima facie* case in favor of Snook; as to the existence of his debt to the amount uncontroverted; hence, as the appellants based their right to the relief sought by them upon the ground that the note was fabricated by the parties for the fraudulent purpose of enabling Snook to subject to its payment all the property of Bright and to hold it for benefit of the latter and thereby prevent his real creditors from collecting their debts, all of which Snook denied, the onus was upon them to establish that these charges were well founded by satisfactory evidence.

We are not of the opinion that the testimony in the cause justifies this conclusion, but, upon the contrary, it seems to us that it rather preponderates in favor of the existence of an indebtedness by Bright to Snook of a sum approximating the amount of the judgment rendered in his favor.

We are also of opinion that the evidence fails to establish a fraudulent combination between Snook and Bright to manufacture in favor of the former grounds of attachment, and thereby to enable him to acquire priority over Bright's other creditors.

Much stress is laid upon the conversation had by Bright with Basket, and it is attempted to be made to appear that immediately thereafter Snook hunted up Basket and enquired of him as to said conversation. But the statements of Basket establish no such fact.

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He did not meet with Snook until after he had attached, and when they did meet, Snook made no enquiries of him touching his litigation with Bright, but, upon the contrary, the witness without being solicited made a voluntary statement to him that he (the witness) thought that the attachment could be sustained. And then and not till then, did Snook inquire what he knew about it. And all this occurred some considerable time after Bright had been to the home of Basket, possibly within a very few days of a month. Nor does the fact that Snook met with the deputy clerk upon his return from Bright's after taking his acknowledgement of the deed to Nutes, establish the fact that Snook knew what was going on and that he was waiting for the return of the deputy, in order that the latter might retail to him the conversation between himself and Bright.

It appears that the deputy had been sent for by Bright several days before, and it does not appear that he had set apart or designated any day certain upon which he would go, and it was, therefore, impossible that Bright and Snook could have so arranged the matter as to have had the pretended creditor at the depot awaiting the information which would warrant him in serving out his attachment.

Considering all the testimony in the cause, we conclude that Snook by reason of his being the largest creditor of a debtor known to be in failing circumstances was thereby induced to exercise greater vigilance than the appellants in looking after his interests and that the result of this vigilance was the discovery by him that his debtor had left the county of his residence to prevent those of his creditors who were suing from having process served upon him, and that he was attempting to dispose of his property for the purpose of hindering and delaying his creditors in the collection of their debts, and that acting upon this information he secured a priority which the court below was bound to respect.

Wherefore, the judgment is affirmed.

Wheat, Roberts, for appellant.

Caldwell & Harwood, for appellee.

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R. H. ARKENBURGH v. W. T. SHORT.

Partnership—Liability for Debt for Firm.

While facts that S. by his conduct and conversation held himself out to the public as a partner of a firm, it will not have the effect of making property in his possession liable for the payment of debts contracted by him years before the plaintiff had any connection with him.

Same—Written Agreement as Evidence of Agency.

One relying on a written agreement, which shows S. to be merely an agent, can not subsequently claim S. to have been a partner and rely on the writing to prove same.

APPEAL FROM M'LEAN CIRCUIT COURT.

April 26, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

No reason is assigned why Short resorted to a petition in equity instead of proceeding by motion upon the bond executed to suspend the sale under his execution, as provided for by section 716 of the Civil Code.

There was, however, no objection taken in the circuit court to the mode of proceeding adopted, hence such objection can not be made available in this court. The only material issue presented by the pleadings is as to whether or not Sproy and Arkenburgh were partners. Short specifically alleges that they were partners, and that by reason of their partnership Sproy owned one-half of the tobacco levied on. The answer of the appellants directly controverts both of these propositions.

The only evidence tending to establish the partnership is the fact that the business was conducted in the name of A. Sproy & Co., and that Sproy, by his conduct, and conversation, held himself out to the public as a partner. These facts of themselves would be sufficient to make him responsible for the payment of the debts contracted by the concern, but we can not admit that they could have the legal effect of making the property in his possession liable for the payment of debts contracted by him years before Arkenburgh had any connection with him, unless the parties seeking to

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subject the property were able by other and competent evidence to establish that a partnership actually did exist.

It is not shown that Arkenburgh had any knowledge of the fact that Sproy was conducting the business in his own name, nor that he had information of the fact that Sproy claimed to be his partner.

Sproy's employes, whose depositions were taken by the appellee, did not regard Sproy a partner in the concern, although it was conducted in his name, for the very good reason that they knew him to be hopelessly insolvent and wholly unable to raise any part of the large sums of money being used in the purchase of tobacco.

Again, if the fact that Sproy held himself out as a partner, and conducted the business in his own name, can be used as evidence against the appellant. Then certainly the written agreement between Arkenburgh and Sproy, which is signed by both parties, and which seems to have been read upon the trial of this cause without objection is competent and convincing in his favor, this writing establishes conclusively that Sproy was a mere agent, acting for the appellant, having no interest whatever in the tobacco being purchased and shipped. It is true that the terms of this agreement were afterwards changed by an oral contract, but that change had reference to the manner in which the business was to be conducted and was not intended and did not give Sproy an interest in the business or the tobacco.

Considering all the evidence in the record, we are of opinion that the appellee failed satisfactorily to establish the existence of the partnership.

The judgment is reversed, and the cause remanded with instructions to dismiss Short's petition.

Owen, for appellant.

Baker, for appellee.

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CHARLES BROWN v. SAMUEL HARPER.

Fraudulent Conveyance.

Evidence of good faith in purchase and payment by third party.

APPEAL FROM NELSON CIRCUIT COURT.

January 2, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The deposition of Forsythe, which seems to have been improperly rejected, establishes very conclusively that Brown did make a cash payment of three hundred dollars on the mill property, and there is no evidence, whatever, tending to show that the two notes for the deferred payments which were transferred to Graves were received by him in pursuance to any fraudulent agreement between any or all of the parties.

Graves proves further that the timber he delivered at the mill after the date of Brown's purchase was delivered in pursuance to a contract made with Brown.

The evidence fails to show that any relationship or intimacy existed between Brown and Forsythe, or that Brown had at the time of his purchase any knowledge of the existence of appellee's debt.

Considering the character of the property sold, we are of opinion that the change of possession was sufficiently proven.

It was doubtless the purpose of Forsythe in making the sale of the mill property to evade the judgment of the debt of Harper, but as the evidence fails to connect Brown with any participation in or knowledge of such fraudulent intent, it seems to us that the court erred in disregarding his purchase, and subjecting his property to the payment of said debt.

Unlike the case of *White, &c., vs. Cates*, 7 Dana 357, the evidence before us does not incline the mind to the conclusion that the conveyance was fraudulent as to Brown. We are of opinion that the judgment of the court below was erroneous, and the same

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is hereby reversed, and with instructions to dismiss the petition of appellee as to Brown.

McKay, for appellant.

Hardin, Grigsby, for appellee.

SUSAN BAILEY'S HEIRS, &C., v. URIAH COTTLE.

Ejectment—Foreclosure—Instructions as to Costs.

Under a prayer of a petition for a judgment for land, and for \$300.00 for being kept out of land, an instruction, "If the jury find for the plaintiff they may also find for him in damages the reasonable rent of the land and extra costs of prosecuting this suit not exceeding \$300.00." Held to be improper, as no extra costs can be allowed, the only costs allowable being that incidental to the suit.

APPEAL FROM MORGAN CIRCUIT COURT.

April 14, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

Whether or not the unsold part of the 80-acre tract and the 50-acre tract were sold under the Burnes' judgment of foreclosure, and whether they were included in his mortgage were facts properly submitted to the jury, and instruction "No. 1," given by the court in relation to that issue is unobjectionable.

But instruction "No. 2," given for appellee, is certainly novel, and can not be approved by this court. It reads as follows:

If the jury find for the plaintiff they may also find for him in damages the reasonable rent of the land "and *extra costs* of prosecuting this suit, not exceeding three hundred dollars."

The prayer of the petition is for a judgment for the land, and for three hundred dollars for being kept out of possession.

Before the adoption of the *Civil Code*, in an action of ejectment for the recovery of real estate, a judgment for damages for rents and for the land could not be united, but after the party had judicially established his right to the land, he could not be united,

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he could bring his action for *mesne* profits, but now he may unite a prayer for the profits with the one for the land and recover both in one action, but we are not aware of any law statute or other common, authorizing the jury to include in their verdict *extra* costs; that is an undefined and broad expression; even more than the fees of attorneys might be included. There is no evidence in this case of any *extra* costs that appellee was put to, and the instruction leaves the jury unlimited discretion to say what they will find for *extra* costs regardless of and without any evidence on the subject.

The jury assessed \$83 in damages whether it was for *mesne* profits, or for extra costs does not appear, nor can we know, and judgment was rendered therefor; if it had appeared that it was for the profits alone we would not be disposed to interfere.

The costs allowed by law to the successful party are incidents to the judgment the court includes them therein, and there is no necessity for any instruction in relation to them; but as the jury in this case had nothing to do with *extra* costs, instruction No. 2 was erroneous, and the judgment in consequence thereof must be reversed.

Instruction No. 1 asked by appellant was in substance given in instruction No. 1 for appellee, and was properly overruled as were all the others asked by appellant; but for the error in giving instruction No. 2 for appellee as before indicated the judgment is reversed and the cause is remanded for a new trial and for further proceeding consistent herewith.

Hazelrigg, for appellants.

Cooper for appellee.

V. S. BOISSEAU v. TOWN OF FRANKLIN.**Taxation—Appeals from—Jurisdiction.**

Under a sale for taxes, of personal property, no appeal lies under Civil Code section 16, where the amount involved is less than the statutory amount.

APPEAL FROM SIMPSON CIRCUIT COURT.

May 9, 1871.

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OPINION OF THE COURT BY JUDGE LINDSAY:

The relief sought in this action was to restrain the sale of the plaintiff's horse which had been levied on by the marshal of the town of Franklin to satisfy certain taxes alleged to be due from him to said town, and to enjoin the town from proceeding in any other manner to distrain for or enforce the collection of the same.

It appears from the record that the amount of said taxes was the sum of eighteen dollars and thirty-seven cents (\$18.37), and that this was the whole amount in controversy.

Under the construction frequently given by this court to the sixteenth section of the Civil Code as amended, no appeal can be prosecuted to the court of appeals where the amount in controversy is less than fifty dollars, except in cases in which the title to real estate is involved, or in some way called in question.

Therefore, having no jurisdiction of the matter, both the appeal and cross-appeal are dismissed.

Wilkinson, for appellant.

Bush, for appellee.

JOHN BEAVAN, &C., v. N. T. BERRY, TRUSTEE, &C.

Husband and Wife—Tenants of Entirety.

Right of survivor to take, and convey.

APPEAL FROM MARION CIRCUIT COURT.

January 17, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

As to two-thirds of the land conveyed by Hagan, and Berry and wife to Jarboe and wife, took as tenants of the entirety, that conveyance was made in 1827, before the adoption of the *Revised Statutes*.

By the stern rule of law established by a current of authorities, coming down to 1868, the last reported case on the question being *Simmons, etc., vs. McKay, etc.*, 5 Bush 25, the surviving grantee

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under deeds of this character is entitled to the estate. The case of *Babbit, etc., vs. Scroggin, etc., 1 Duvall*, is very similar to this in its facts, and in that case the husband having survived was adjudged entitled to the estate.

As it appears that W. Jarboe survived his wife, he thereby became entitled to two-thirds of the land under the deed of Hagan and Berry and wife, which, by his conveyance, passed to his trustee.

Wherefore, the judgment is *reversed*, and the cause remanded for further proceedings consistent herewith.

Noble, for appellants.

Harrison, for appellees.

JAMES BOON v. MARY GIVENS.**Dower—Fee Simple Estate.**

The acceptance of a vendee, of a husband's conveyance, while having the effect to estop the purchasers vendees from denying the husband had title, it can not be construed into an admission that he held such an estate in the land as will entitle his surviving wife to dower, without proof by her that he was seized and possessed of the land in fee simple.

APPEAL FROM NELSON CIRCUIT COURT.

January 16, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The petitioner in this action alleges that her deceased husband was, on the 20th of September, 1825, upon which day he made the conveyance to Stanislaus Burche, "seized and possessed of the two tracts of land out of which she claims dower. Whether or not he was seized of an estate in fee simple in said land is not directly charged. The answer, however, distinctly and unequivocally denies that he was ever at any time "seized and possessed" of said lands at all.

There is no proof in the record tending to show that the husband of the appellee was at any time during the coverture in the actual possession of the lands. Nor that he had title of any kind to the same.

The acceptance of Burche of the husband's conveyance may

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have the effect of estopping those who hold under him from denying that he had title of some kind, but it can not be construed into an admission that he held such an estate in the lands as will entitle his surviving wife to dower.

Besides, the petitioner signed the deed to Burche, and she admits in her petition that she attempted to relinquish her potential right of dower in the lands. She claims, however, that she did not acknowledge and deliver said deed in the manner and form required by the statute to make it binding upon her. As she repudiates the paper to which she admits she was a party, she can not in a court of equity be allowed to rely upon the same as sufficient evidence of itself to authorize her to recover in a proceeding of this kind.

We are of opinion that the record before us does not show that George Given, deceased, was, during his coverture with the appellee, seized of such an estate in the two tracts of land mentioned in her petition as under the law entitled her to dower.

The judgment of the court below is, therefore, reversed, and the cause remanded for further proceedings consistent herewith.

Johnson, for appellant.

Muir & Wickliffe, for appellee.

R. H. BISHOP & Co. v. M. H. McKEE, &c.**Accounts—Acceptance of Note as Payment—Best Evidence.**

For an account of M. a creditor accepted through his agent, the note of V., giving the following receipt: "Received J. T. Vanarsdale's note one day, date, for above amount being in full. R. M. Bishop & Co., H. C. T." In an action against M. on the account, held, the receipt was the best evidence of the acceptance of the note in full payment.

Same—Payment.

The acceptance on an account, of a note of a third party, is a good defense of payment of the account.

APPEAL FROM MERCER CIRCUIT COURT.

December 10, 1870.

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OPINION OF THE COURT BY JUDGE HARDIN:

The appellee, M. H. McKee, residing in Harrodsburg, Ky., and conducting a retail grocery and confectionary business, mainly through the agency of her son-in-law, James S. Vanarsdale, became indebted to the appellants, who were wholesale grocers of Cincinnati, Ohio, in an account of \$1,716.68, for which, in June, 1866, H. C. Threlkeld, their authorized agent, accepted the promissory note of Vanarsdale and executed and delivered to him for Mrs. McKee, the following receipt, appended to a statement of the account: "Received J. T. Vanarsdale's note one day—date for above amount being in full. R. M. Bishop & Co.—H. C. T."

Without cancelling or offering to return the note of Vanarsdale, but assuming to hold it as collateral security for the original debt, the appellants instituted this suit in March, 1869, to recover of Mrs. McKee \$1,000, of the same account, and sued out an attachment against her property, Vanarsdale and others being made parties to the action only as garnishees and claimants of the attached effects.

The principal ground of the defense, and the only one which we need to consider, was that the acceptance of the note of Vanarsdale constituted a valid payment and satisfaction of the original debt, and was, therefore, a bar to the action, and this defense being sustained by the court, the petition was dismissed, and the attachment discharged, and the plaintiffs have appealed to this court.

It was not sought to avoid the settlement made by Thelkeld, as fraudulent, nor does the evidence authorize the conclusion that it was so; but the main question in relation to it was whether the note of Vanarsdale was taken as a satisfaction and in payment of the account, or as security merely.

The testimony of Threlkeld, taken apparently without the receipt before him, and which is not consistent with its tenor and effect, conduces to prove that the adjustment made by him was not intended to absolve the appellee from her liability on the account, but the plain import of the receipt, as well as some corroborative evidence, authorizes an opposite conclusion: and as it is not shown nor even alleged that the receipt was executed under any mistake as to what it contained, we must regard it as furnishing the best evidence of the agreement of the parties.

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The acceptance of the promissory note of a *third person* will generally support the defense of payment; and we observe nothing in this case to make it an exception to this general rule (2 Greenleaf on Ev., section 523; Tomlin vs. McChord's Admrs., 6 J. J. Marshall 1; Letcher vs. Bank of the Commonwealth, 1 Dana 82). Wherefore, the judgment is affirmed.

Hardin, for appellants.

Kyle, Thompsons, Hardin, J. D. Hardin, for appellees.

DOC WARING v. COMMONWEALTH.**Elections—Proof of Vote.**

Upon identification of one, who voted at a certain precinct, it is proper to permit the poll books to be read as evidence to the jury to show that his vote was recorded and counted.

Same—Residence.

The statute on "residence," of one claiming the right to vote, is the place where the family of a married man resides, unless such residence is for a temporary purpose only. If the family is permanently at one place, and he transacts business at another, the former shall be his residence.

APPEAL FROM GREENUP CIRCUIT COURT.

November 7, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

Having identified appellant as Franklin Warren, who voted at the Liberty precinct in August, 1870, it was proper to permit the poll books to be read as evidence to the jury to show that his vote was recorded and counted.

But it was erroneous to instruct the jury without qualification that the place where a married man's family is, is his residence.

The statute on the subject of fixing the residence of an individual claiming the right to vote in a particular precinct, is that the place where the family of a married man resides shall generally be considered his residence unless the family so resides for a temporary

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purpose. If his family is permanently in one place and he transacted business in another, the former shall be his residence.

The instruction under the evidence should have embraced the foregoing propositions in conformity to the statute.

1 Vol. R. S., pp. 434-435.

For the error in the instruction, therefore, the judgment must be *reversed*, and the cause remanded for a new trial and for further proceedings consistent herewith.

Halbert, Thomas, for appellant.

JOSEPH SHAWHAN v. JOSEPH TAYLOR & WIFE.**Dower—Wills.**

Allowance to widow in lieu of property required by statute, except as to that which is exempt.

APPEAL FROM HARRISON CIRCUIT COURT.

June 27, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

Under the will of Daniel Shawhan, the Misses Rule were entitled to the principal sum placed in his hands by their father for their benefit and interest thereon from the testator's death, the interest up to that time only being withheld for expenses, it appearing that he did not intend to charge them more; and the devise of 100 acres of land to each of them not being a satisfaction of the debt according to our construction of the will. It results that the court erred in failing to allow the appellant credit by the sum due to the Misses Rule which he seems to have paid.

As to the allowance of \$500 to Mrs. Taylor in lieu of the property required by the statute to be set apart to a widow, the judgment is right, according to the case of Newman vs. Winlock, Admr., &c., 3 Bush 241, to which we adhere, unless Mrs. Taylor received other property or money equivalent to the exempted property, without charge, which may be further investigated on the return of the cause, as may be, also, the question as to the item of \$504.66, for money in bank, as to which the judgment is

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complained of by the appellant. As to errors assigned on the cross-appeal, no ground of reversal is perceived. The demurrer to the second paragraph of the petition was properly sustained, if not for an estoppel shown by it in the sale and conveyance to the appellant, for the defect of parties defendant to litigate the question of dower, and the question as to the rent of the land under its apportionment was settled correctly and on the true basis.

Wherefore, for the single error indicated, the judgment is reversed on the appeal, and the cause remanded for further proceedings not inconsistent with this opinion, and the judgment is affirmed on the cross-appeal.

A. H. Ward, for appellant.

J. Q. Ward and Trimble, for appellee.

WILHELM VANDRIE v. ELIZABETH MAGEL.

Wills—Undue Influence—Improper Relations—Revocation of Former Will.

APPEAL FROM JEFFERSON CIRCUIT COURT, C. P. DIVISIONS.

June 8, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

Admitting the fact that at the date of the papers purporting to have been executed on the 24th and 25th of March, 1869, William Magel, though near his death, was not mentally incompetent to make a valid testamentary disposition of his property; and conceding, also, that if the first of those papers was valid, it would constructively operate to revoke the will of 1866. We are constrained to conclude, after a careful consideration of all the evidence, that the judge of the court of common pleas, by whom the case was tried without a jury, properly established the will of 1866, which was unquestionably the true will of the testator unless revoked.

An elaborate statement or view of the evidence is not deemed necessary; it may suffice to say that it sustains the conclusion that the paper written and signed on the 24th of March, 1869, was the

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result of an undue influence and advantage which the appellant and her sister and brother-in-law, Wilkerson, had and exercised over the testator; and that notwithstanding his improper relations with the appellant, he would not, in health and the free exercise of his own wishes and judgment, have given her his estate without having married her, and without canceling, or even attempting expressly to revoke his will of 1866, in favor of the grand-children of his deceased wife, to whose labor and economy, it appears, the accumulation of his property was in a great measure due.

Wherefore, the judgment is affirmed.

Bramlette & Durrett, for appellant.

Elliott, Atchison & Joseph, for appellee.

G. W. SLAUGHTER v. WM. A. LOONEY.

War—Military Authority.

One taking property, without compensation to the owner, acting under a superior officer, can not excuse himself on the ground that he was acting in obedience to orders actual or constructive, unless it was under coercion.

APPEAL FROM CALLOWAY CIRCUIT COURT.

September 9, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

Neither the pleadings nor the evidence presented any question as to the existence of a public or military necessity for the taking and appropriation by the appellant of the mare in controversy to the public use; hence there was no reason for giving any instruction on that question. Nor was it proper to instruct the jury, if there had been any evidence to authorize the conclusion that appellee took the mare under the orders of a superior officers, that such orders protected him from responsibility in any event. If the mare was the private property of the appellant, and not the subject of capture, as being used in the war by an antagonist enemy, and the appellee, though acting in a military service of the United States, took her without compensation to the owner, and without his consent, there being no military necessity for doing so, he

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could not excuse himself on the ground that he acted in obedience to orders, actual or constructive, unless the power under which he acted amounted to coercion, and forced him to do what he did; for, as a general rule, an unlawful act can not be justified or excused by unlawful command to do it. Therefore, according to the facts disclosed in this record, the appellee could only have excused himself for taking and appropriating, or causing to be appropriated the mare ridden by Jackson Slaughter, on the ground that she was captured by Slaughter, being used by him in the service of the army in the war against the United States (Hague vs. Penn, 3 Bush 663, and authorities there cited).

Wherefore, the instructions and rulings of the court being inconsistent with the foregoing views of the law of the case, the judgment is reversed, and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

Brown & Miller, for appellant.

BEN DAVEN'S EXORS. v. MARY ASH.

Res Judicata—Judgment.

Former judgment a bar to relief sought. Injunction properly dissolved.

APPEAL FROM NELSON CIRCUIT COURT.

June 1, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The agreement of T. Ash and wife, of record in connection with the judgment for the recovery of the slave Bedford, as we construe it, bound them in consideration of the judgment to account for the sum of \$700 furnished by Ben Davens to pay for land, and \$315, as the price of Bedford, as advancements in the settlement of Daven's estate, when, it seems to have been contemplated, that the several sons of Davens would also account for nearly like sums advanced to each of them; but we do not think it was understood by the parties that Ash and wife should account for said advancements if the other distributees did not also account for advancements. But the whole matter was afterwards litigated in the suit

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for a settlement and distribution, and the court upon its construction of Ben Davens' will, decided that no advancements should be charged to any of the parties, and in effect decided that Ash and wife should not account for said sums of \$700 and \$315. The suit was not dismissed as to them without prejudice, as seems to have been supposed, but it was only so dismissed as to the right of some other parties than Mrs. Ash and the executors. That judgment is, in our opinion, a bar to the relief sought in this action, and for that reason, at least, the court in this case properly dissolved the injunction and dismissed the petition.

Wherefore, the judgment is affirmed.

Grigsby, for appellant.

Newman, for appellee.

SMITH McELROY, &C., v. ROBT. C. PALMER, &C.

Judgment—Appeal—Stare Decisia.

Debt payable out of general fund, not a preferred debt.

APPEAL FROM WASHINGTON CIRCUIT COURT.

March 10, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The court below adjudged that the McElroys, Smith, and Spaulding's administrator had a preferred lien on the one-third of the tract of land conveyed to Mrs. Palmer by the late Ben Hardin after Mrs. Elliott's part was set apart to her, that being the interest of Hal Palmer derived by descent from his mother, because he, in his life-time, had become responsible to them for their debt, this preference, however, was subject to the life estate of his father, Dr. Palmer, in the land. This preference they get under the judgment first rendered, which was appealed from, and was affirmed by this court; that question, therefore, is concluded by the former adjudication.

We see no objection to the judgment so far as Elliot and wife

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are concerned; they got what was adjudged to them by the former decree.

Nor was it erroneous to adjudge to the McElroys, Smith, and Spaulding's administrator their full *pro rata* of their debts out of the estate of Dr. Palmer after exhausting the proceeds of Hal Palmer's part of the land, that fund constituted no part of Dr. Palmer's estate, but was independent of it, and after being reduced by the proceeds of Hal Palmer's interest in the land. They were entitled to their proportionate share of the other estate.

Perceiving, therefore, no error thus far in the judgment, it is affirmed; but the claim of T. R. and wife for the \$10 per acre on the one-fourth of the land conveyed by the late Ben Hardin to Mrs. Palmer was not a preferred debt, it was payable out of the general fund, and is payable *pro rata* with the other general creditors, for the error alone of giving Hardin and wife a preference for this claim over the general creditors the judgment is *reversed*, and the cause remanded for a judgment in conformity hereto, and this judgment on the cross-appeal is affirmed.

JUDGE HARDIN not sitting.

Broune, for appellants.

R. & F., W. H. Hays, for appellees.

JOS. B. WALLINGFORD *v.* AMOS BASSETT'S ADMR., &C.

Bond for Title—Sale of Land—Rescission of Contract.

Interest not allowed for longer time than contract authorized. Purchaser not bound to accept deed, different from contract he made.

APPEAL FROM LEWIS CIRCUIT COURT.

November 3, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The bond executed by Amos Bassett and Willitt and Clary and their wives to the appellant does not import a sale of the interests of Joseph Waring, Mrs. Johnson and the children of Mrs. Thompson, deceased, nor does it appear that there was any contract, written or oral, between Waring and Johnson and wife and the appel-

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lant for the sale of their interests in the land; and no sufficient reason is perceived for forcing on the appellant the alternative of either accepting the deed as tendered, including those interests, and paying for them at the contract price of the other shares, or submitting to a rescission of the contract as to the shares which he did not purchase; and the judgment is in that respect erroneous. It is also erroneous in allowing interest on the debts of Mrs. Thompson's representatives for a longer time than their contract authorized.

We are of opinion the court properly held the appellant bound by the statements of his answer showing there were 95 acres and 20 rods of the land, and as neither the appellant nor Mrs. Thompson's children sought to avoid their sale, it would have been proper to adjudge a specific execution of the contracts, as embracing all the land except the interests of Waring and Johnson and wife, and to have enforced the vendor's lien; provided the married women insisted in proper deeds to divest themselves of title; but for the reasons we have sufficiently indicated, the appellant was not bound to accept the deed tendered, which expresses a different contract from that which he made.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Andrews, Thomas, for appellant.

Halbert, for appellee.

JAMES G. ARNOLD v. LOUIS HALL.**Deeds.**

Execution, delivery and acknowledgment by officer of bank. Adverse possession sufficiently established.

APPEAL FROM KENTON CIRCUIT COURT.

April 11, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The possessory title of the Bank of the United States to the lot of land in controversy was, we think, sufficiently established by

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proof of actual possession, held continuously for more than twenty years by said bank and its vendor, Biddle.

The deed from Biddle, the president of the bank, to Chester and Mansfield, executed in 1835, and probably acknowledged before an alderman of the city of Philadelphia (section 4, of an Act to amend the laws regulating conveyances, approved January 15th, 1831, Statute Laws, volume 2, page 450), and if such acknowledgement were not sufficient the execution of said deed is amply proven by the witnesses, Kirby and Mansfield, the latter of whom was made a competent witness by the release of Hall.

The execution and delivery of the deed from Ames and wife to Hall was clearly proven by the subscribing witness Yenton, and being thus proved it was admitted as evidence of Hall's title as against Arnold. *Allen, &c., vs. Trimble*, 4 Bibb 21.

We, therefore, conclude that the evidence is sufficient to uphold the verdict of the jury, and it only remains to enquire whether or not the instructions of the court to the jury were correct. Instructions Nos. 1, 2 and 3, given at the instance of Hall, as qualified by instruction No. 3, given upon the motion of Arnold, are, in our opinion, unobjectionable. Instruction No. 2, asked for by Arnold, was properly refused, and instruction No. 1 was also properly refused in view of the fact that No. 3 stated the law upon the subject of actual adverse possession far more accurately and with greater clearness.

There appears to be no error in the record prejudicial to the substantial rights of appellant.

Wherefore, the judgment is affirmed.

O'Hara, for appellant.

Benton, for appellee.

AMELIA E. BARNARD *v.* EDW. B. BARNARD.

Husband and Wife—Divorce.

Where evidence does not show for six months last past, the husband habitually behaved toward the wife in a cruel and inhuman manner, as to indicate a settled aversion to her, etc., no statutory grounds for divorce.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY BRANCH.

May 10, 1871.

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OPINION OF THE COURT BY JUDGE LINDSAY:

This record develops the fact that upon several occasions appellee has treated his wife with inexcusable harshness, and that for some months before their separation he manifested for her very little affection. It is very clear that she has not received from him that degree of attention nor that sympathy she had a right to expect, in view of the protracted suffering she experienced from the unfortunate malady which resulted in the loss of one of her eyes.

Still, the testimony in the case does not justify the conclusion that appellee had for six months habitually behaved towards her in such a cruel and inhuman manner as to indicate a settled aversion to her, and to destroy permanently her peace and happiness, nor that his conduct and threats had been such as to indicate an outrageous and ungovernable temper in him, such as to probably endanger the appellee's life, or to subject her to personal violence at his hands, had she continued to live with him. Hence, no statutory grounds for a decree of divorce seems to exist.

While it seems that during all the unfortunate domestic disagreements unfolded by the evidence before us, the conduct of the appellant has been blameless, except in failing to return to her husband's house upon her arrival at Louisville from Cincinnati, the courts under the law have no power to interfere in her behalf. The chancellor did not err in dismissing her petition, and his judgment must be affirmed.

Elliott, for appellant.

Carull, for appellee.

JAMES A. EDWARDS v. JOHN B. CARTER, &C.

Judicial Sales—Sale Bonds.

A conveyance executed in obedience to an order of court is a sufficient confirmation of the sale.

APPEAL FROM GRAVES CIRCUIT COURT, C. P. DIVISION.

March 7, 1872.

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OPINION OF THE COURT BY JUDGE LINDSAY:

Neither the judgment nor the sale deed conveyance, made pursuant thereto, in the proceeding by the statutory guardian of appellant for the sale of the land in controversy, were void. The facts set out in the petition gave the court jurisdiction. The necessary bond was executed to secure to the infants the proceeds of the sale of their lands. The report of the commissioners was in substantial conformity to the law. The failure of the purchaser to execute the bonds required to be given by the judgment did not necessarily render the sale invalid.

The conveyance executed in obedience to the order of the court was a sufficient confirmation of the sale.

We are not prepared to decide from the facts before us, that because the land was purchased by the statutory guardian he held the title in trust for his ward, but even if such be the case, his vendees can not be compelled to surrender their possession in a proceeding like this.

The sale as before stated was not void, and it can not be impeached in a collateral proceeding.

Judgment affirmed.

L. Anderson, for appellant.

Williams, Tice & Miller, for appellees.

CYPRIAN P. MATTINGLY v. THOS. P. LINTHICUM.**Attorney and Client.**

Notes deposited as collateral security. Collection and payment.

APPEAL FROM NELSON CIRCUIT COURT.

December 20, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

The facts in this case do not warrant the conclusion that Linthicum received the notes deposited with him by Mattingly in the capacity of attorney. We are satisfied that he received them as

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collaterals to hold as indemnity on account of his suretyship to Willit. There is nothing in the record conducing to show that in the matter of their collection and in the application of their proceeds to the payment of Willit's note he failed in any particular to act with reasonable prudence, or in the utmost good faith. He is, therefore, not responsible for the amounts he was not able to collect.

The commissioner's report, however, shows that there remained in his hands December, 1867, the sum of \$56.66. In his exceptions he complains that the commissioner made errors in his calculations prejudicial to him, and that the basis of some of these calculations were erroneous. He fails, however, to point out specifically these errors. The court below did not pass upon these exceptions, and this court has failed to discover the errors alleged. We are of opinion that judgment should have been rendered against him for the amount mentioned.

His services as attorney, although not specially employed to sue, were worth far more to appellant than the amount of this balance, but Linthicum insists that by express contract he was to receive nothing for such services, except the attorney's fee allowed against the parties sued.

Judgment reversed, and the cause remanded for proceedings consistent with this opinion.

Johnson, for appellant.

Muir & Wickliffe, for appellee.

F. McCORKHILL v. W. H. DIX, &c.**Partnership.**

Equal division of payment. Liability for proportion of debts, out of amount not paid in.

APPEAL FROM LOUISVILLE CHANCERY.

February 17, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

It is made to appear by the petition of the appellee, that the

Opinion of the Court.

property owned by Kennedy at the time McCorkhill became his partner was valued at \$6,000, and that in order to become an equal partner in the same, the latter agreed to pay either to Kennedy or to certain of his creditors holding liens on such property the sum of \$3,000.

Of this amount he paid \$1,000 in cash.

It further appears that out of the profits of the firm the debts of Hall and others against Kennedy to the amount of \$2,603.16 were paid. To one-half of this amount McCorkhill is entitled as a credit on his indebtedness to Kennedy, which leaves the accounts between them thus:

Original indebttness	\$3,000.00
Amount paid in cash	\$1,000.00
One-half amount paid to Hall and others..	1,301.59— 2,301.59

Balance still due\$ 698.41

The proceeds of the agreed sale of the partnership effects were \$2,657.45. To one-half of this amount, \$1,328.72, McCorkhill was entitled, but from this amount there should be deducted the \$698.41 due to Kennedy on the original contract of partnership. This sum when deducted leaves \$640.31, which ought to have been paid over to McCorkhill out of the proceeds of said agreed sale.

The error of the chancellor grows out of the assumption that McCorkhill owed the firm, when, in point of fact, his indebtedness was to Kennedy. The order made June 17th, 1870, requiring McCorkhill to pay into court \$277.78 is erroneous, and the chancellor is directed to set the same aside, and hold it for nought. Further proceedings will be had consistent with this opinion.

J. G. Wilson, for appellant.
Barnett & Edwards, for appellees.

Opinion of the Court.

J. R. HALLAM v. JOHN CLINE.

Judgment—Modification on Motion—Error of Lower Court.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 14, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON:

As the record does not, by bill of exceptions or otherwise, show the evidence heard by the court, we must presume from the face of the judgment, that the facts authorized the judicial recognition of the alleged terms of the oral extension of the lease, and consequently the appellant's right to reimbursement of the cost of the improvements made by him, under faith in that contract when repudiated by the appellee.

This entitled the appellant to a judgment against the appellee for the excess of his account over that of the appellee, according to that contract for \$75 a month, which was, as to amount, altogether reasonable. Recognizing that contract, the circuit court had no authority for charging the appellant \$35 a month, and especially as the appellee claimed only \$30.

We therefore adjudge that the circuit court erred in not modifying the judgment on the appellant's motion, and that consequently the judgment was erroneous as to the appellant and not so as to the appellee.

Wherefore the judgment is reversed on the original appeal only, and the cause remanded with instructions to render judgment in the appellant's favor, according to the principle of this opinion.

Hallam, for appellant.

Webster, for appellee.

Opinion of the Court.

JESSE FISHBACK v. ISAAC S. CROUCH.

Bills and Notes—

Fraud in assignment of note, when order given for part of same known not to have been accepted.

APPEAL FROM BOURBON CIRCUIT COURT.

December 9, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON :

As the appellant, on the representation by the appellee, that he was the assignee and owner of the note on James Henry, paid him \$215 for an order on the said James for that amount. If that representation was false, the appellee was guilty of a fraud which made him liable, on an implied promise, to refund the money so paid to him by the appellant. And if the appellee *was* assignee and owner of the note, he was guilty of a fraud in collecting the whole amount of the note, or contriving to have it paid to the obligee's widow when he knew that his order had not been accepted, even if the order had been a bill of exchange and he had no notice of its non-acceptance; because he could have lost nothing for want of notice, whether he owned the note or not, and, on that hypothesis also, the law implied a promise of restitution to the appellant.

The circuit court therefore erred in its instruction for the appellee, inconsistent with this opinion. Wherefore the judgment is reversed and the cause remanded for a new trial.

Hanson, for appellant.

Davis, for appellee.

Opinion of the Court.

ABNER DAVIS v. NICHOLAS GWYNN.

Judicial Sales—Bond of Purchasers—Remedy of Co-Vendee—Action by Rule—
Costs for Defending Another Suit.

APPEAL FROM UNION CIRCUIT COURT.

May 6, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

Davis having purchased the property at the commissioner's sale at the price of \$2,000, gave his bond therefor to him for the benefit of himself and appellee, and a lien was reserved for the purchase money in the bond, he has no reason therefore to complain that a judgment was rendered in favor of appellee *in rem*, he might have proceeded by rule against appellant to compel him to pay his part of the price in court, but having elected to prosecute his claim by suit in the nature of a cross action, appellant has no cause to complain of that, as he was not prejudiced thereby.

As for his claim for services in going to Missouri to aid in prosecuting the suit of Anderson, McClam, &c., against Bridges it does not appear from allegation or proof, that he was requested by appellee to go, nor does it appear from the evidence that it was necessary that he should go, and in that state of case he cannot make appellee liable for any of the expenses he may have incurred in that way.

The payment of appellee will be a satisfaction of the sale bond taken by the commissioner, and we perceive no error prejudicial to appellant in the proceedings, wherefore the judgment is *affirmed*.

A. Davis, for appellant.

Jeff Brown, for appellee.

Opinion of the Court.

JOSEPH BOOTH v. M. V. GUDGEL.

Judgment—Verdict not Sustained by the Weight of Evidence—Instructions as to Loss.

APPEAL FROM FRANKLIN CIRCUIT COURT.

September 23, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

Although, in our judgment, the verdict of the jury is not sustained by the weight of the evidence, still the preponderance is not so palpably and decidedly against the verdict as to authorize this court to interfere and set it aside. The evidence is somewhat conflicting.

The only instruction given for appellee points out specifically what facts must exist, or in what his delinquency must have consisted, to render appellant responsible for the loss. One or the other of which must have existed, and if the loss resulted from any other cause he was not responsible. This, we think, is a correct exposition of the law.

The instruction asked by appellant and refused by the court, being "No. 3," left out of view altogether, or excluded from the consideration of the jury whether the change of position of the team after it was in the boat was made by the direction of the ferryman, as to which there was some proof, and consequently the instruction was properly refused.

Perceiving, therefore, no error available for reversal, the judgment must be *affirmed*.

Lindsey, for appellant.

Opinion of the Court.

ELIZABETH WARFIELD & Co. v. D. S. GOODLOE, &c.

Guaranty—Contract to Hold Party Harmless—Procedure.

APPEAL FROM FAYETTE CIRCUIT COURT.

September 30, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

If the writing, upon which this suit is instituted, can be regarded as an obligation upon which the appellees are personally liable, it must be construed as a guaranty upon their part that they will leave the appellants harmless in the event they shall suffer loss from pursuing with proper diligence, their vendor Johnson. The appellees had no interest whatever in the sale and delivery of the whisky by Johnson to the appellants, and the only consideration upon which the validity of the obligation is based, was the refusal on the part of appellants to pay to Johnson the money on the whisky until this writing was executed. Johnson's liability to the appellants originated the moment this whisky was seized and confiscated by the government officials, and all that the appellees agreed to do was to leave the appellants harmless in the event they lost the whisky and failed to recover the money back from their vendor, Johnson. The petition fails to allege the exercise of any diligence in pursuing their remedy against Johnson, or his insolvency, and the proof is as silent upon this subject as the petition. The judgment of the court below is affirmed.

Breckinridge & Thornton, for appellants.

Huston & Mulligan, for appellees.

Opinion of the Court.

J. T. SHELBY v. T. P. YOUNG.

Pleadings—Allegations in Petition and Answer, Justifying Verdict—Denials in Reply—Sufficiency.

APPEAL FROM BOYLE CIRCUIT COURT.

September 14, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

There are two fatal errors in the judgment in this case. First, appellant distinctly alleges that appellee is indebted to him in the sum of fifty dollars from Thomas Cogar, which Cogar owed appellant and appropriated the same to his own use. To this allegation he made no reply; and, *second*, he admits an indebtedness to appellant of \$158.32, but undertakes to plead by way of counter-claim to that admitted indebtedness, other demands against appellant in his reply that he could not do. Under that state of pleading appellant was entitled to a credit for the amount charged in his answer to have been collected of Cogar, and the instruction asked by him in reference to the amount, admitted to be owing to him in appellee's reply, should have been given. It would also seem, according to the doctrine of this court in *Francis vs. Francis*, 18 B. M. 57, the denials in the reply were not sufficient; but without expressly deciding that question, and waiving any expression of opinion as to the decided preponderance of the evidence, the judgment must be reversed for the errors suggested, and the cause remanded, with directions to award a new trial and for further proceedings consistent herewith.

Thompson, for appellant.

Durham, Jacob, for appellee.

Opinion of the Court.

SARAH McCALL v. JAMES McCALL'S HEIRS.

Pleadings.

Admission in petition and answer.

Wills.

Deed—reservation to control estate during life.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

June 2, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

In two answers and a cross-petition, filed in the case by appellant, she expressly and repeatedly admits that the instrument under which appellees claim the personal estate of the late James McCall is a deed, and has not subsequently withdrawn those admissions, consequently the question as to whether the writing be a will or a deed, so elaborately discussed by appellant's counsel, is concluded by her admissions in her pleadings.

Nor do we perceive any error in the judgment prejudicial to appellant in any other particular. By the terms of the instrument, the whole of the personal estate of the grantor passed to the beneficiaries; he only reserved to himself the right to control and manage the same during his life, in the event that he should choose to do so; to improve and increase the same for the benefit of his children by his own labor and that of his servants, and to have a support out of it, and to use such part of it for religious purposes as he might think proper.

Such of the personal property included in the writings as remained in kind at the death of the grantor, and the additions made thereto by him by its use, appellees certainly are entitled to, and as it does not appear that any of the personal property left by decedent was acquired in any other way, except that which he took upon the death of his son, and as appellant got one-third of it, we do not discover that she is entitled to any more than was adjudged to her.

Opinion of the Court.

Wherefore, the judgment is affirmed.

Hill & Alcorn, for appellant.

G. O. R. McCall, for appellees.

CARPENTER & BROS. v. JAMES STEVENSON, &C.

Contracts—Damages for Violation of Contract—Triable by the Court.

APPEAL FROM HARRISON CIRCUIT COURT.

March 10, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

As both the appellant and Stevenson claimed damages for violation of the contract, which might have been more appropriately determined by the finding of a jury, and as Stevenson did some extra work, for which he should have been compensated, and there is a contrariety of evidence as to what proportion of the contract price of \$3,100 should have been allowed for work done strictly in accordance with the agreement, it is difficult to determine what was the true balance due to Stevenson. The circuit court, on a review of all the facts, came to the conclusion that appellants should be charged said sum of \$3,100 and credited by payments amounting to \$1,602.25, leaving a balance of \$1,497.75, and for the reasons we have indicated, and without the aid of the verdict of a jury or report of a commissioner, we can not say, with judicial certainty, that this is usury, and must therefore affirm it.

As to the claim of Miller, it seems to be just that it should be paid out of the balance found owing to Stevenson, and if, as insisted, the judgment against the bank for its payment in satisfaction of so much of Stevenson's claim, as allowed, is irregular and unauthorized; yet, as the bank does not appeal from the judgment, the error, if it exists, can not be available as a ground of reversal on this appeal of Carpenter & Brothers.

Wherefore, the judgment is affirmed.

Ward, for appellant.

Trimble, for appellee.

Opinion of the Court.

THOS. A. MARSHALL v. W. J. WALLER.

Attorney and Client.

Fees to be paid by other litigants in additional actions.

APPEAL FROM SHELBY CIRCUIT COURT.

March 9, 1870.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The judgment of the circuit court being affirmed, for which this conditional covenant was given to said appellant for his services in the appellate court as counsel, to sustain it the fifteen hundred dollars conditional fee became absolute, and the sole inquiry then, is whether it has been paid, save the eight hundred dollars acknowledged.

There were other suits relative to the lottery grant which was in contest, and this obligation specially provides that Marshall might take fees from other parties, whose interest were in harmony with Waller, and besides this employment did not embrace services in the circuit court, but alone in the appellate court, and his employment and services in the circuit court has complicated the payments, but we are satisfied from the evidence and circumstances that no other payment than is acknowledged by Judge Marshall was ever made to him, on this claim; therefore, with a lengthy analysis of the pleadings and evidence and circumstances, it is so adjudged, and the judgment of the lower court not harmonizing with this view is reversed, with directions for further proceedings consistent herewith, which also has the effect to affirm the judgment on the cross-appeal.

Marshall, Harwood, for appellant.

Lindsey, for appellee.

Opinion of the Court.

NEWTON DICKERSON *v.* H. B. ALVERSON, &c.

Homestead Exemptions.

Debts created before law went into effect.

APPEAL FROM JESSAMINE CIRCUIT COURT.

December 20 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

Although the note to Willis was paid and the judgment of Hayes was paid and transferred after the homestead law went into effect, as both of those debts were created and the appellant became bound thereon as the surety of appellee, Alverson, before that time, both debts were as between the plaintiff and Alverson, liabilities prior in date to the homestead exemption law, although afterwards changed in form, and so far as Alverson was concerned, they were debts which he owed before as well as afterwards. We are of opinion, therefore, that the court erred in allowing the defendant the benefit of the homestead exemption as to these debts.

Wherefore, the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Bronaugh, for appellant.

A. G. SLICER *v.* THOS. A. PALMER.

Mortgages—Prior Lien—Pro Rata Distribution Among Creditors—Fraudulent Conveyances.

APPEAL FROM FLEMING CIRCUIT COURT.

September 23, 1870.

Opinion of the Court.

John N. Warren, an insolvent contractor for the partial construction of the Maysville railroad, being indebted to Thomas A. Palmer for five carts, mortgaged them to William P. Price to secure, and also to the appellant, A. C. Slicer, by separate deeds for securing distinct debts to each.

On Palmer's petition, charging that each mortgage was made to secure an antecedent debt and for the purpose of preferring those creditors, and therefore claiming distribution, the circuit court decreed a sale and *pro rata* payment of all the creditors. The appellant, Slicer, showing that a portion of his debt was contracted simultaneously with and on the faith of the mortgage, claims a reversal on that ground.

But, as the residue of the integral consideration was a pre-existing debt, his defense is unavailing.

Wherefore, the judgment is affirmed on Sliver's appeal.

And as Palmer held no lien and even a fraudulent purchase from him by Warren did not affect the mortgages as purchasers without notice, the judgment is affirmed also on his cross-appeal.

Andrews, for appellant.

Cox, Given, for appellee.

C. H. HEWLETT v. J. J. ASHLEY.**Contract—Boundary.**

Failure of consideration, where amount of land comes up short.

APPEAL FROM HOPKINS CIRCUIT COURT.

March 4, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

From the written contract between Robertson and the appellee, it appears to have been contemplated by both of them that the boundary of land embraced by the sale, and which the appellee would get title to, would contain between six and seven hundred acres, which, at the contract price of \$5 per acre, would not only discharge the appellee's own debt on Robertson for \$1,150, but

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leave more than enough in his hands to pay the debt of about \$1,100 of Robertson & Barrett to the appellant; and so believing, the appellee promised to pay the appellant's debt. It afterwards turned out that he could only get, under his purchase, about 208½ acres of the land, which at the stipulated price did not discharge his own debt, so there was an entire failure of consideration for the undertaking to pay the appellant. And as it does not appear that the appellee was guilty of any fraud, or did any act constituting an estoppel to preclude him from relying on the want of consideration as a defense, the petition of appellant was properly dismissed.

Wherefore, the judgment is affirmed.

Petrie, for appellant.

JOSEPH CURD v. NANCY CURD.

Vendor and Purchaser—Pleadings—Amended Petition and Answer—Burden of Proof.

APPEAL FROM MERCER CIRCUIT COURT.

October 17, 1870.

OPINION OF THE COURT BY JUDGE HARDIN:

The answer to the original petition controverted the allegations importing indebtedness from the appellant to Jennings, and except it be for the price of 12 acres of land, then, as it seems in litigation, the evidence does not sustain the petition, but confirms the answer. By an amended petition the purchase by appellant of the 12 acres is set up and suit between him and Jennings, litigating the title, is referred to as evidence, and the appellee took on herself the burden of showing that appellant would be indebted to Jennings by a judgment in that case, confirming the contract; this, though controverted, was not sustained by an exhibition of the record of that suit or otherwise.

As the question of indebtedness depended on the result of that suit, it is singular that neither party made the fact appear in any legitimate way, but the burden being on the plaintiff to make

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out her case, the judgment in his favor can not be sustained. As the special judge who tried the case may have based his action on some result of the other suit, which does not appear in this record, this court refrains from directing peremptorily a dismissal of the case, on its return to the court below, which will permit further preparation and proceedings with reference to the confirmation or rescission of the contract concerning the tract of 12 acres of land.

Wherefore, the judgment is reversed, and the cause remanded for further proceedings as herein indicated.

C. A. Hardin, for appellant.

Polk & Bro., for appellee.

PARKER & HUDSON v. THE COMMONWEALTH.**Appeal—Error in Refusing a Continuance.**

The appellate court, under section 334, Criminal Code, has no power to reverse a judgment of conviction in a prosecution for felony, because of error by the court below in refusing a continuance.

Same—Instructions—Reasonable Doubt.

An instruction by the court on reasonable doubt, which calls the attention of the jury to the consequences resulting from acquittal upon mere light and technical doubts, not growing out of the evidence, does not in itself authorize a reversal.

APPEAL FROM CALDWELL CIRCUIT COURT.

May 8, 1871.

OPINION OF THE COURT BY JUDGE LINDSEY:

This court having no power, under section 334 of the Criminal Code, to reverse a judgment of conviction in a prosecution for felony, because of error by the court below in refusing a continuance, it is not necessary that we should inquire into the sufficiency of the affidavits upon which the appellants based their motion.

The instructions given at the instance of the appellants were certainly as favorable to them as the law and facts warranted,

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and were sufficient to so far qualify those given for the Commonwealth, as to bring them within the stricter construction of the rules of criminal procedure. We see no objection to the definition given by the circuit court to the term "reasonable doubt," and whilst it may be questionable as to whether the court should, as was done in the case of Graham, 16 B. Mon. 592, in addition to such definition, call the attention of the jury to the consequences resulting from acquittals upon mere light and technical doubts not growing out of the evidence. That fact of itself does not authorize a reversal by this court. Instruction No. 6, asked for by appellants, was properly refused. It is not only abstract, but it assumes as true the important fact that there was no evidence before the jury even tending to corroborate the testimony of the witness, who testified as to statements or threats previously made by the appellant, Parker.

Perceiving no available error in the action of the court below, and having no power to reverse on account of the verdict not being supported by sufficient evidence, we must affirm the judgment appealed from.

Duvall, for appellant.

Rodman, for appellee.

J. W. LAUGHLIN v. THOS. H. MOORE, &C.**Pleading.**

Where the proof shows one is entitled to a credit larger than that claimed in his pleading, the proper remedy is by an amended petition, and not to try to correct the error by an appeal.

APPEAL FROM CLARKE CIRCUIT COURT.

May 16, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

Appellant's counsel call our attention to three rulings of the circuit court which they insist are each erroneous. They complain that Laughlin was twice charged with the check for \$1,090, deposited in Poston's Bank. If the amount of the same was em-

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braced in the \$12,608.00, the proceeds of the sales of the stock, then he should have received no separate credit for the amount of the check. If upon the contrary, it was not embraced in said amount, as it was a part of the firm assets, and as he received an individual credit therefor by the bank, he was properly chargeable with the amount of the same on a settlement of the partnership.

As to the expense account, we do not think there can be any real difficulty. Appellant, in his original petition, claimed on that account the sum of \$795.05, which amount was allowed him. He now insists that the proof shows that he was, in point of fact, entitled to nearly double that sum, and hence that the court erred in restricting his recovery on said account to the amount claimed. He had the right to amend his pleadings to make them conform to the proof, but inasmuch as he did not see proper to do so, it is no ground of complaint upon his part that the court did not allow him more than he asked for.

This leaves for consideration only the \$418.40, paid to Quisenberry, and for which appellant insists he should have received a credit. This debt was paid by a check on Poston's Bank. In the settlement, appellant was credited by the entire amount of firm assets deposited by him in said bank, and it is perfectly manifest that he should not also be credited for the same money as he drew it out in the payment of debts contracted in partnership purchases. We do not regard either of the rulings complained of as prejudicial to the appellant.

Wherefore, the judgment of the circuit court must be affirmed.

Brown & Julian, for appellant.

Eginton, Simpson, for appellee.

Opinion of the Court.

NANCY BRADY v. THE STEAMER ARMADA ANN BURNS, &c.

Admiralty—Jurisdiction—Action in Rem for a Marine Tort.

APPEAL FROM UNION CIRCUIT COURT.

September 15, 1868.

OPINION OF THE COURT BY JUDGE WILLIAMS:

The petition is against the steamer Armada Ann Burns and J. V. Throop, as master, and as to the boat and her owners, it is a proceeding in rem for a marine tort. Who the owners, or what their names, are not designated in the caption nor the petition, nor is there any process against them as individuals.

As to the boat and her owners, the case comes clearly within the principles announced by the Supreme Court of the United States in *Hines vs. Treno*, 4 Wallace 355, and as decided by this court in *Stuart vs. Hany*, 3 Bush. And belongs exclusively to admiralty jurisdiction, and the demurrer was properly sustained.

But as to Throop, the petition sets out a case of trespass clearly remedial by the common law, and, therefore, is not a mere marine tort to be remedied by a proceeding in rem in the admiralty courts of the United States, but is one for which he may be held personally responsible by suit in any court having common law jurisdiction.

It is true that slavery was not recognized by the common law, yet slaves being personal property by the positive law of Kentucky, any violation of the owner's legal rights thereto, within her jurisdiction, may be redressed by common law remedies as has often been held in the courts of this and other States.

Wherefore, the judgment sustaining the demurrer as to the "Armada Ann Burns" is affirmed. But as to J. V. Throop, it is reversed, with directions to overrule it as to him, and for further proceedings as herein indicated.

Huston, for appellant.

Spalding, McElray, Bush, for appellee.

Opinion of the Court.

E. R. WEBB v. DAVID STEPHENS.

Removal of Cause in State Court.

Motion to remand, must be made or objection is waived.

Injunction—Error in Judgment.

An Injunction will not lie to restrain collection of a judgment, in which there is an error, the proper proceeding being by appeal and supersedeas.

APPEAL FROM MAGOFFIN CIRCUIT COURT.

October 27, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

This action was brought against appellant in the Floyd quarterly court, and on his motion the venue was changed to the Magoffin circuit court, the preliminary steps having been taken, such change of venue was authorized by an act of the Legislature, approved *19th of November, 1851, 1 Vol. R. S., p. 232*, which was not repealed by the act approved *March 5, 1860, Myres' Supp. 78*. That is an act to amend and to reduce into one, the law in relation to changes of venue in criminal and civil cases in the *circuit courts*, as the title of the act shows. Besides, if appellant objected to the removal of the cause to the *Magoffin circuit court*, he should have moved to have the same remanded back to the Floyd quarterly court, and having failed to do so, any objection to the trial in the *Magoffin circuit court* was waived.

The judgment is for more than is claimed in the petition, and that is an error for which it would have been reversed if an appeal had been prosecuted to this court therefrom within the time prescribed by the statute. But that error in the judgment affords no grounds for an injunction.

Nor were the other grounds as stated in the original, or either of the amended petition, sufficient to authorize the setting aside the judgment and to award a new trial. The evidence alleged to have been discovered is not of that permanent character that would most probably produce a different result on another trial.

Judgment *affirmed*.

George E. Roe, for appellant.

Opinion of the Court.

JOHN DAVIS v. WM. DAVIS.

Pleading—Limitations.

Plea in bar, when court suspended by military authority.

States.

The Legislature may, at its will change, modify or repeal the Statutes of Limitation, so that it does not change or injuriously affect vested rights.

APPEAL FROM JOHNSON CIRCUIT COURT.

December 14, 1870.

OPINION OF THE COURT BY JUDGE PETERS:

The cause of action accrued in the spring of 1860. By an act of the Legislature, approved *20th of February, 1861, Myers' Supp. 293-4*. The running of the statute of limitations was suspended in the county of Johnson, in which county this suit was brought, from the 1st of May, 1861, until quiet was restored and the courts could be held in said county, and, according to the proof, no circuit court was held in said county until May, 1865, and this suit was brought in February, 1869; counting out the time during which the running of the statute of limitations was suspended by said act, even if one year, had expired before the 1st of May, 1861, still the bar would not have been complete until May, 1869, three months after the suit was brought.

In *Cassity vs. Storm, &c., 1 Bush 452*, in commenting on the statute of 1864, this court said this statute doubtless must have the effect of striking from the computation such time in all cases which have not been barred, and in which the statute was running at the time of its enactment. It is true that the question involved in that case was not the precise question in this. But the doctrine was fully recognized in that case, and has been in many others, that the Legislature of the State may change, modify, or repeal statutes of limitations at its will, so that it does not change, or injuriously affect, vested rights, rights perfected by the law before its modification, or repeal.

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We must, therefore, give effect to the statute *supra*.

As to the lands claimed by appellant and for which the court gave him no relief, he filed no title papers, and his claim was too imperfectly set out, and the location too uncertain to authorize judicial action on that branch of the case.

Concurring, therefore, with the circuit court, his judgment must be *affirmed*.

Moore, Ireland, for appellant.

Stewart & Brown, for appellee.

ANN W. TIBBATTS v BENJAMIN BEALL.

Husband and Wife.

Conveyance for wife a joint one for herself and husband.

Restitution of purchase money.

APPEAL FROM CAMPBELL CIRCUIT COURT.

September 21, 1870.

OPINION OF THE COURT BY JUDGE ROBERTSON :

As James Taylor's conveyance to his daughter, Mrs. Tibbatts, was not to her sole and separate use, her husband had a resulting right to enjoy the profits jointly with her, and any proceeds which accrued she had a right to allow him to use, even exclusively. And although he and she had no power to convey the legal title without her trustee's consent, yet their sale to the appellee, Beall, and the husband's receipt of the advance payment of \$345 entitled Beall to restitution, unless the trustee should finally refuse to confirm the sale by conveying the legal title. Though such a conveyance was never made and the contract was finally rescinded by a decretal order, in November, 1866, still the trustee so far ratified the sale by a compromise with Beall and Mrs. Tibbatts, when a widow after Tibbatts' death, as to charge the trust fund with the amount paid to Tibbatts by Beall. And a judicial settlement of the trust confirmed that allotment of the \$345 to the trust fund.

Thus, not only the trustee, but Mrs. Tibbatts, when discovert,

Opinion of the Court.

ratified the sale to the extent of the \$345. And this bound her, and consequently her representatives, to make restitution to Beall, as the judgment of 1866 took from him the right to the property he had bought. His right to enforce that liability was not consummated until that decree was pronounced. Consequently the statute of limitations does not bar this suit to recover the amount so added to the trust fund.

The judgment rendered in this case in the appellee's favor for the \$345 was, therefore, right; and the addition of legal interest from the time of payment to Tibbatts, and perhaps through him to the use of his wife and children, is no apparent error in the judgment, as Beall does not appear to have ever enjoyed the possession or use of the property he bought.

Nor can we judicially see that there is error in adjudging the restitution, also, of \$107 charged to have been paid by Beall for taxes on the property he bought; that charge, though *ignored*, is not so traversed as to require extraneous proof. The appellants must be presumed to know whether the trustee paid those taxes or whether Beall paid them, and how much, and we can not presume without sufficient data to decide that the circuit court charged too much interest on the \$107.

Wherefore, the judgment for \$913.39 is affirmed.

Stevenson & M., Hodge, for appellant.

Hallam, for appellee.

ALFRED ORR ET AL. v. HUGH GEROGHTY & WINDSOR.

Parent and Child.

Bona fide purchase by son, for a valuable consideration.

APPEAL FROM CAMPBELL CIRCUIT COURT.

December 8, 1870.

OPINION OF THE COURT BY JUDGE LINDSAY:

The relationship existing between the appellants, there being no proof that any part of the alleged purchase price for the house and

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lot was paid, together with the continued possession of the son after the execution of the deed to the father, in our opinion, rebuts the idea that Alfred Orr was, in point of fact, "*a bona fide* purchaser for a valuable consideration without notice" of the lien held by appellee upon said house and lot. By the terms of the written contract it is difficult to determine the exact time the balance (after the first two payments) was to become due and payable. It is true that according to the construction given the contract by the circuit court, it was possible that said *balance* might have become due before the building had been either completed or roofed. But we think it may be fairly deduced, from the writing itself, that the parties did not contemplate the possibility of six months being consumed in the erection of the house, we are satisfied that they undertook that by the terms of the contract the whole price was to be paid within six months after its execution. Upon this hypothesis, we can account for the fact that Alfred Orr had overpaid the first two payments by about two hundred dollars before this suit was brought, and that *he* is his original and amended answer. And *his father in his* original answer failed altogether to intimate to the court that the debt in favor of appellee was not due at the time they commenced this suit. The contract being uncertain upon its face, it is proper that some importance should be attached to the conduct and understanding of the contracting parties, in construing it, and considering all these things, we are inclined to concur with the circuit court in its conclusion upon this question. Hence we hold that said court did not abuse its discretion in overruling the motion of appellants to file their joint amended answer. We think said court properly deducted fifty dollars from the contract price on account of defective materials used in the construction of the building.

Wherefore, the judgment is affirmed upon both the appeal and cross-appeal.

Rool, for appellant.

Webster, for appellee.

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WM. BERRY'S ADMR. v. JAS. H. BERRY'S CURATOR, &C.

Judgments.

Proceeding in lower court, after mandate returned.

May 1, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The court below properly entered a judgment in accordance with the mandate of this court before permitting any supplemental pleadings to be filed, and as the cause is still under the control of the circuit court, if appellant should desire to pay the money, and should tender it in court, or pay it over in conformity to the judgment rendered, and desire to be relieved from any farther, or future, litigation growing out of the conflicting claims to it, and present a supplemental pleading to obtain that end, the court below can order the curator to execute bond and appoint him its receiver to hold the money as such, pending the litigation between the claimants to it, whereby it will be subject to any future order, or judgment of the court, and having done so the court can enter judgment dismissing the action as to appellant, and as it is consolidated with the action of Charles Berry and his assignees against appellant, both actions can be ordered to be prosecuted against the curator of J. H. Berry, and dismiss both against appellant, reciting the fact in the judgment that he had paid and satisfied the judgment against him in favor of the curator, and thereby discharge appellant from further responsibility.

As to Charles Berry and his assignees, it does not appear that they have either prosecuted an original or cross-appeal from the judgment, although their attorney has a brief in the case asserting that there are some errors in the judgment to their prejudice; this court can not, without such appeal or cross-appeal, adjudicate as to them, and we therefore express no opinion as to the propriety of the action of the court below in imposing any such terms, as expressed in the judgment on said Charles Berry and his assignee in filing this answer and cross-petition.

The judgment as between appellant and James H. Berry's curator is *affirmed*.

Lacy, Holt, for appellant.

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C. ANDEL v. A. J. ROODEN.

Actions—Defense.

One guilty of laches in a defense, depending on a third party to look after his interest, cannot complain of a judgment against him.

APPEAL FROM HENDERSON CIRCUIT COURT.

May 2, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

The prominent and controlling facts in this case are inconsistent with the claim of appellant to the property in controversy.

After this suit was instituted he was warned by the attorney to defend for him, of its pendency and objects, before the judgment for the sale of the property was rendered, and then made no defense, but contented himself by saying that Kloninger had some money of his, which he had been in possession of since 1860, but the amount he did not recollect, and gave his attorney no direction or authority to make any defense for him, and asserted no claim to the property. Nor did he, in that letter, claim to have advanced any money to pay for the property.

The surety for the purchase money was procured by Kloninger, and money to make payment borrowed by him, and the facts developed show that appellant was not in condition to take money from his business to invest in real estate. The \$600 which he professes to have advanced were borrowed, according to his own showing, \$1,000 for the second installment were borrowed by Kloninger from the Farmers' Bank without any effort on his part to raise the money, and these two sums were not equal to the purchase price, and it can not be credited that he had money to invest in real estate in a city in a different State and remote from his business and residence when the greater part, indeed all but about \$300 of the purchase price was borrowed, and that refunded by installments and renewal of the notes.

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Besides, the account that Kloninger gives of the money advanced is complicated, inconsistent with itself, and unsatisfactory.

We, therefore, concur in the opinion of the court below, and adjudge that the judgment should be *affirmed*.

Rodman, for appellant

Vance & Yeaman, for appellee.

BETSY ADAMS v. COMMONWEALTH.

Criminal Law—Instructions—Misdemeanors.

In prosecutions for misdemeanors, as well as felonies, the accused should not be convicted on a preponderance of testimony if the jury have a reasonable doubt of the guilt of the accused.

Indictment—Law—Question for Court.

It is not necessary to allege in an indictment the existence of the law under which it is made; that is a question for the court.

APPEAL FROM ROCKCASTLE CIRCUIT COURT.

December 6, 1871,

OPINION OF THE COURT BY CHIEF JUSTICE PRYOR:

The instructions in this case are necessarily misleading. They authorized the conviction of the appellant upon a mere preponderance of testimony in favor of her guilt.

In prosecutions for misdemeanors, as well as for felonies, the accused should not be convicted if the jury, from all the evidence, entertain a reasonable doubt as to his guilt. Criminal Code, section 236.

The instructions given in this case should have been modified to this extent.

The indictment is sufficient. It was not necessary to allege that the act of March 21st, 1870; had been ratified by a vote of the people of Rockcastle county. The existence of the law under which the indictment was formed is a question to be determined by the court, and not by the jury.

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For the reason indicated, however, the judgment is reversed and the cause remanded for a new trial.

Carter, for appellant.

A. G., for appellee.

COMMONWEALTH v. SAMUEL PEYTON.

Bail—Forfeiture—Sufficiency of Bond.

A bail bond is not sufficient, which fails to stipulate a court in which the defendant is required to appear.

APPEAL FROM OHIO CIRCUIT COURT.

December 6, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The bail bond of Peyton did not stipulate that he should appear before any other judicial officer or officers as an examining court, than Townsend, nor was any place designated for the holding of the court; and for these reasons, it seems to us the action of the two justices in ordering the forfeiture of the bond, and returning it to the circuit court, for proceedings against the bail was unauthorized, and the demurrer was, therefore, properly sustained.

Wherefore, the judgment is affirmed.

JAMES EWING v. COMMONWEALTH.

Indictment—Allegation of Time.

An indictment for a misdemeanor is sufficient if it alleges that the offense was committed in a certain month, without giving the day of the month.

APPEAL FROM MARION CIRCUIT COURT.

December 6, 1871.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

We perceive no error in the judgment of the court below. The indictment alleges that the accused on the day of April, 1870, unlawfully carried concealed on his person a deadly weapon, a pistol, at James Spalding's magistrates court. This is not material in a case like this except to show that it was previous to the finding of the indictment. If the indictment had alleged that he carried concealed this pistol in the month of April, 1870, it would have been sufficient. The proof shows that it was carried at Spalding's magistrates court, and whether it was at the regular court or not is immaterial. This proof authorized the instructions given.

The judgment is affirmed.

Belden & Cleaver, for appellant.

Attorney General, for appellee.

J. R. BOTTS ET AL. v. COMMONWEALTH.**Indictment—Filing Away, Not Dismissal.**

The mere filing away of an indictment is not a dismissal of the prosecution.

Arrest—Bondsman May Make.

After an indictment is filed away the bondman of of the defendant may cause his arrest and delivery to the jailer.

APPEAL FROM CARTER CIRCUIT COURT.

December 6, 1871.

OPINION OF THE COURT BY CHIEF JUSTICE PRYOR:

The demurrers to the original and amended answers were properly sustained.

The mere filing away of the indictment was not a dismissal of the prosecution against Young. His bondsmen might at any time thereafter arrest him and deliver him to the jailer of Carter

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county in the manner prescribed by the Criminal Code of Practice.
Judgment affirmed.

No attorneys given.

COMMONWEALTH v. W. K. PERRY ET AL.**Criminal Law—Empaneling Jury—Dismissing Indictment—Bondman Released.**

A trial is begun when the jury is empaneled, and if the indictment is dismissed and resubmitted to the grand jury, the surety on the appearance bond is thereby released.

APPEAL FROM BUTLER CIRCUIT COURT.

December 7, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

On the second day of the November term, 1870, of the Butler circuit court, the accused appeared in court in pursuance to his bond. Whereupon his sureties, the appellees, in open court agreed to stand responsible on their bond during the trial then about to begin. A jury was empanelled and the trial progressed. Finally the indictment was dismissed, and the case resubmitted to the grand jury. This was a termination of the trial, and with it the liability of the appellees ceased. They were not responsible for the future conduct of the accused.

Judgment affirmed.

W. H. CALVERT v. JOHN F. MORSE.**New Trial—Weight of Evidence—Newly Discovered Evidence.**

The verdict of a jury will not be set aside unless it is palpably against the weight of the evidence. Newly discovered evidence, which is merely cumulative, is not sufficient.

APPEAL FROM CALDWELL CIRCUIT COURT.

December 8, 1871.

 Opinion of the Court.

OPINION OF THE COURT BY JUDGE LINDSAY:

Appellant makes no objection to the instructions given by the court to the jury. The verdict cannot be said to be palpably against the weight of the evidence. It was the province of the jury to weigh all the facts and circumstances detailed by the proof and their finding will not be disturbed except in cases in which it is palpably wrong. The newly discovered testimony is merely cumulative and we are not prepared to decide that in case it had been before the jury a different result would have been produced. We concur with the circuit court in its action in overruling the motion for a new trial.

Judgment affirmed.

Calvert, for appellant.

Marble & Son, for appellee.

 EZEKIEL HILL, &C. v. COMMONWEALTH.
Bail—Form of Bond—Attesting Witness.

It is not necessary to the validity of a bail bond that the officer before whom it is executed shall subscribe his name as a witness thereto.

APPEAL FROM PENDLETON CIRCUIT COURT.

December 9, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

We are not aware of any law by which the presiding judge of a county court acting as an examining court is required to subscribe his name as a witness to a bail bond executed in his presence, and by his order acting as such court, by a person charged with an offense, and his sureties. It is not required by the form for such bonds prescribed under *Sec. 77, Criminal Code*.

And we apprehend that if such attestation was prescribed that a bail bond good in all other respects, would not be invalid

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failure would be a mere irregularity which would be cured by Section 80 of Criminal Code.

The recognizance in this case conforms substantially, if not literally, with the form prescribed in the Criminal Code and must be deemed valid.

But if it be conceded that the answer presented a good defense—a question we need not now decide—still the court below did not err in permitting the judge, who took the recognizance, to subscribe his name as a witness to it—since appellants were not prejudiced thereby—although it was not necessary to the validity of the recognizance—nor did the court err in permitting him to testify as a witness.

Wherefore, the judgment is *affirmed*.

Ireland & D., for appellants.

JOSEPH BAUMAN v. COMMONWEALTH.**Homicide—Murder—Plea of Self-defense—Evidence—Instructions.**

When the accused relies on a plea of self-defense and if there is any testimony tending to establish his plea, however slight, the court should give an instruction covering the law of self-defense.

Reasonable Doubt—Jury Must Not Weigh the Evidence.

The jury have no right to weigh the evidence in a criminal case, and they have no right to weigh the testimony of any single witness. If they have a doubt as to the credibility of a witness this doubt must be resolved in favor of the accused.

APPEAL FROM JEFFERSON CIRCUIT COURT.

December 10, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

The testimony in this case both upon the part of the Commonwealth, and the accused, conduced to establish the fact that the accused and the two young men with him had been pursued by Fred Kennin and others, from the house where the dance took place, into the middle of the street; that Kennin had a large knife drawn and was evidently attempting and intending

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to inflict upon some one of the party personal injury. What justification Kennin and his party had in making the pursuit is not proper to be either discussed or determined by this court. The deceased was at the dance, but not present when the pursuit commenced, but seems to have arrived shortly after, and as soon as he reached the street, where the accused was, the fight between him and the accused began. There is conflicting testimony as to which of the two struck the first blow, and whether or not the deceased joined Kennin and others in the effort to chastise or inflict punishment upon the accused and his companions, is for the jury alone to determine. The accused is relying for an acquittal, upon the ground that the killing was done in self defense. The court in the instructions given for the Commonwealth, and the accused, excluded altogether from the consideration of the jury, all that part of the difficulty occurring at the dance house, and up to the time the fight took place in the street. When the testimony tends to establish any available legal defense in a case like this, however slight, the law should be given as applicable to the facts, and the jury left to determine their existence, or in other words, what facts have been proven. The court below upon the facts proven, should have given instructions 2, 3 and 5 asked for, by defendants' counsel, viz: No. 2, "That in determining whether or not Bauman had reasonable grounds to believe himself in danger of great bodily harm, or of being killed, the jury should consider all the facts and circumstances proven in the case, from the beginning of the difficulty at the house up to the termination of the conflict with Snyder." 3, "That if the jury believe from the evidence that Bauman left the dance house and went into the street, for the purpose of avoiding the conflict, and that he and his companions were pursued by the crowd from the house into the street, and whilst in the street became enjoined in a combat with Snyder and that Snyder had driven him back to the wall or fence, and the crowd were pursuing and encouraging Snyder and crying out 'knock him down,' 'kill him, &c.,' and that from all the facts proven the accused had reasonable grounds to believe and did believe that he was in imminent danger of being killed, or of great bodily harm and to save himself from such danger stabbed and killed Snyder, they should find him not guilty, although the jury may not believe he was really in such danger." 5, "It devolves upon the Commonwealth to prove every

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material fact necessary to make out the guilt of the accused, and if the jury entertain a reasonable doubt as to the existence of any material fact, necessary to constitute the accused guilty, they must acquit." The eighth instruction given by the court is not the law of the case; in this instruction the jury are told that if the accused did the killing, &c., he is guilty of manslaughter *unless they are satisfied the killing was done in self defense*, the accused is by this instruction made to prove his innocence, or his excuse for killing, beyond a reasonable doubt. If the jury believe that the accused did the killing, and have a reasonable doubt from the evidence as to whether it was done in self defense or not, they must acquit. All doubts result in favor of the accused in a criminal prosecution. The 9th instruction given by the court is objectionable only, for the reason that the jury in passing upon the defense of the accused, are confined to the assault in the street and not required to consider all the facts from the time the difficulty commenced at the dance house until it terminated. The 12th instruction given by the court upon the propositions embraced in law, and in this instruction, the jury are told that "*they have no right to weigh the evidence, and find a verdict of guilty upon a mere preponderance of testimony, but in the 13th instruction the jury are told that it is their duty to weigh all the evidence in the case and that they are the exclusive judges of the credibility of the witnesses, and the weight to which each witness is entitled to.*" The jury have no right to weigh the evidence in a criminal case, and they have no right to weigh the testimony of any single witness. They, of course, have the right to determine whether he is swearing falsely or telling the truth, but if they have a doubt as to the credibility of a witness, or as to the truth of any statement made by a witness, this doubt results in favor of the accused. To justify a verdict of guilty, the evidence must not only be sufficient to satisfy the jury of the guilt of the accused, but must be sufficient to exclude from their minds all reasonable doubt on that subject, 2 Met. page 34, June vs. Commonwealth. The court, as this case will have to be again tried, has seen proper to comment on the testimony only so far as to enable them to determine upon the propriety of the giving and refusing the instructions by the court below. For the errors herein indicated, the judgment of the court below is reversed

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with directions to grant the accused a new trial, and for further proceedings not inconsistent with this opinion.

Bramlette, for appellant.

COMMONWEALTH v. JNO. S. COOKENDORFER.

New Trial—Motion for—Essential to Appeal

On an issue and trial of a fact by a jury a motion for a new trial is essential to correct the errors growing out of the evidence or instructions before an appeal can be entertained.

APPEAL FROM PENDLETON CRIMINAL COURT.

December 11, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

It might be interesting, and perhaps not uninteresting, to have a judicial determination of the question whether the Mulatto, Booth Allen was competent to testify in the case; but unfortunately for those interested this court is precluded from the consideration, and determination of that question, by the total failure of appellant to move for a new trial in the court below.

In *Humphreys vs. Walton*, 2 Bush, 580, it is said by this court; on an issue and trial of a fact by a jury a motion for a new trial is essential to correct the errors growing out of the evidence, or instructions before an appeal can be entertained by this court, and the same thing was decided in *Detherage vs. Montgomery*, 4 Bush 46.

The failure therefore of appellant to move for a new trial in the court below to have the error complained of corrected deprives this court of the opportunity of expressing its views on the very interesting question of evidence presented in the bill of exceptions. Wherefore the judgment is *affirmed*.

Jno. H. Fryer, for appellee.

Opinion of the Court.

JAS. T. CARTER'S ADMR. v. JOSIAH BRUMMELL'S EXOR.

Executors and Administrators—Executor De Son Tort.

It is well settled that an administrator of an administrator does not represent the first estate, and the only grounds upon which an action can be maintained is upon the allegation that the executor de son tort took possession of the first estate.

APPEAL FROM GREEN CIRCUIT COURT.

December 11, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

David T. Baker was indebted to Josiah Brummell in the sum of four hundred dollars with interest, &c. Baker died and James T. Carter was appointed his Administrator, and took into his possession the goods and effects belonging to Baker's estate. Carter the Administrator of Baker then died, and the present appellant, Thomas P. Hodges, was appointed his Administrator. Brummell, the creditor of Baker also died and John M. Brummell was left his Executor. Baker's debt to Brummell never having been paid Brummell's Executor (the present appellee), instituted his suit at law, against the appellant Thomas Hodges, Administrator of Carter, who was the Administrator of Baker, upon the indebtedness of Baker, to his intestate. No defense was made to the action, and a judgment rendered against the appellant Hodges, Administrator of Carter, for four hundred dollars with interest "*to be levied of the estate of David Baker unadministered, which came to the hands of James T. Carter and in the hands of Carter's Administrator, the appellant.*"

On this judgment an execution issued and was returned no property found. Brummell's Executor then filed the present petition against the appellant Hodges, as Administrator of Carter, alleging "that the appellant, as the Administrator of Carter, had received into his hands, the property and effects of David T. Baker, left by Carter, Baker's Administrator, unadministered, and that he failed and refused to pay the judgment obtained at law, although he had assets sufficient to pay the same.

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The appellant, Hodges, answered denying that any property or assets of Baker, deceased, ever came to his hands, and that he had fully settled up Carter's estate and distributed the assets between his widow and children. The wrong complained of in this case is "that the Administrator of Carter failed to make a proper application of the assets of Baker that came to his hands." It is well settled that an administrator of an administrator does not represent the first intestate, and the only ground upon which this action can be maintained if at all, is upon the allegation, that Baker's property and effects were taken possession of by the appellant, as the Administrator of Carter, and even then, we are inclined to the opinion, that he would be liable as executor de son tort, and not as Carter's Administrator. The judgment first obtained and now sought to be enforced directs the Administrator of Carter to pay the judgment out of the assets of Baker's estate, and the present judgment directs it paid out of Carter's estate. There is no proof in the record showing that any of Baker's effects ever passed into the hands of Hodges, or that he took possession of them either in his own right or as Administrator of Carter. If the proceeding in this case is based upon the idea of a devastavit by Hodges of Carter's estate, it can avail appellee nothing, because, he has no judgment against Carter's estate, and there is no allegation that such a judgment was had, either vs. Carter or the Administrator of Carter, but the judgment itself shows that it is to be made out of Baker's estate, and no part of this estate ever came to appellant's hands. The appellant has also made a settlement and distribution of the whole of his intestate's effects between his widow and children and no right of action exists against him authorizing a personal judgment or a judgment as Administrator of Carter. The judgment of the court below is reversed with directions to dismiss plaintiff's petition.

Chelf, James, for appellant.

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TOM DOYLE v. D. R. BEARD, &C.

Election—Officers—Rejection of Vote—Error—Not Responsible—Construction of Law.

The constitutionality of a law enacted by the Legislature is a judicial question to be determined by the courts, and the judges of an election are not called upon to decide the question.

APPEAL FROM CHRISTIAN CIRCUIT COURT.

December 12, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

We perceive no error in the action of the court below in sustaining the demurrer to appellant's petition. In this case the appellees, who were the judges of the election, were called upon to decide the constitutionality of a law enacted by the Legislature, and applicable to the town of Hopkinsville, by which no man is allowed to vote for councilman, &c., without first having paid his taxes. It was a judicial question and one which appellant's counsel say has not been determined by this court. It is hardly to be presumed that these judges of the election would take it upon themselves to adjudicate upon such an important question. It is true that the petition alleges that they willfully and knowingly refused the appellant a vote, but the appellant further alleges that it was, *for the unlawful and unconstitutional reason that he, the plaintiff, had not paid his taxes to the proper officer*, due the city for the year 1870, in other words, the wrongful act of the appellees consisted in their refusal to regard this legislative enactment in regard to the town of Hopkinsville unconstitutional. The question presented was purely a judicial one, and to make them responsible for an error of judgment, (if any was committed) would be both unjust and impolitic. The constitutional question made in the argument does not arise upon the face of the petition for the reasons already indicated. The judgment of the court below is affirmed. *Morgan vs. Dudley*, 18 B. Monroe, 711. *Crisman vs. Bruce*, 1st Duvall, page 63.

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Feland & Evans, A. H. Clark, for appellant.
Jno. Phelps, for appellees.

RESPONSE TO THE PETITION FOR REHEARING:

This court recognizes the opinion and principles in the case of *Crisman vs. Bruce*, as good law, and in the opinion delivered in the present case, referred to that case as authority, but we cannot regard a defective pleading as good, upon demurrer, for the purpose of deciding a constitutional question. In *Crisman vs. Bruce*, this court says: "*In passing upon the qualifications of a person offering to vote, the judge of the election acts judiciously, and that no judge should be held responsible for a mere error of judgment in the discharge of his official duties, but where the citizen has been deprived of his right by the judge willfully and knowingly he is entitled to redress.*" The allegation in appellant's petition in the present case, that the appellees, as judges of the election, willfully and knowingly refused the appellant the right to vote, when he was a citizen and entitled to vote, of which fact they were cognizant, presented a good cause of action, but the appellant further alleges in substance: "*that this willful refusal, &c., was based upon the unlawful and unconstitutional reason, that plaintiff had not paid his town taxes, &c.*" There is a law applicable to the town of Hopkinsville denying the citizen the right to vote, who had not paid his taxes. This law is conceded to exist by counsel on both sides, and whether conceded or not, would be taken judicial notice of by this court.

Now the petition having set forth the facts constituting this willful act on the part of the appellees, it is for this court to determine whether the facts set forth do constitute a wrong on the part of appellees. If A charges B with fraud and alleges the facts constituting the fraud, if these facts presented do not amount to fraud the pleaded allegation that they constitute fraud amounts to nothing. The petition discloses the fact that the willful acts, considered in this case in refusing to disregard what plaintiffs say, was an unconstitutional law. Now this court adjudges that their failure to disregard the law if unconstitutional, is no willful act, for the reason that the question was a judicial one, and no action can be maintained in such a case, upon such a state of facts. If these judges had been advised by every lawyer in the state that the act was unconsti-

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tutional and they had disregarded their opinions, no action could be maintained against them, and even if they had expressed the opinion themselves, that it was unconstitutional and refused the appellant the right to vote, the action could not be maintained. The case in 1st Duvall is maintained upon the alleged fact that the judges of the election required the voter to make responses to questions, the law did not authorize them to propound, and refused his vote, because he did not respond as they described. In the case of Crisman, &c., the petition alleges "*that he was required to swear that he had not been in the service of the Confederate States, &c.,*" and that the act of the Legislature was unconstitutional and void requiring this oath, &c. If the pleader had stopped here, his petition would not have been good, because the Legislature had passed the law and the constitutionality of the act was purely a legal question, and if the judges had known it was unconstitutional and refused the vote they would not have been liable. But this petition goes on to allege that the judges required him to answer other questions viz: whether he was in favor of furnishing men and money, and upon his not making a favorable response, refused his vote, and this after he had complied with the requirements of the law by taking the oath prescribed by law. In the case of Crisman the unfavorable response of the voter to an interrogatory unauthorized by law, and his being refused a vote therefor made the petition good and authorized a recovery or reversal, and that case fully and in every particular sustains this court in the opinion delivered in the present case.

The petition is overruled.

Feland & Evans, for appellant.

Jno. Phelps, for appellee.

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FRANK BEALMAN v. COMMONWEALTH.

Criminal Law—Shooting at Another—Indictment—Certainty—Proof—Variance—Description of Person Injured.

An indictment must be direct and certain; first, as to the party charged; second, as to the offense charged. Where the offense involves the commission of an attempt to commit an injury to persons or property, and is described in other respect with sufficient certainty to identify the act, an erroneous allegation as to the person injured or attempted to be injured is not material. Where the indictment charges shooting at "A" and the proof shows shooting at "B," the variance is fatal.

Changing Indictment.

In the present case the attorney for the Commonwealth attempted to remedy the defect by entering upon the record the real name of the party injured, which is unauthorized.

APPEAL FROM NELSON CIRCUIT COURT.

December 12, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

The court erred in permitting the evidence of T. P. Lewis to go to the jury and it should have been excluded upon the motion made by the counsel for the appellant to that effect. The indictment charges the appellant with unlawfully shooting at T. P. Lewis and the testimony is, that he shot at Thomas P. Lewis. The 123 section of the Criminal Code provides: that the indictment must be direct and certain: 1st, as to the party charged. 2nd, as to the offense charged. The 127 section Criminal Code provides: "*Where the offense involves the commission of an attempt to commit an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured is not material.*"

This court in the case of Kevil vs. The Commonwealth, 5 Bush, 375, involving a question somewhat similar to the one under consideration says, "the name of the deceased was alleged to be Barbara Kevil, *the wife of the defendant*. The evidence is that her name was Margaret, the name however is but de-

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scriptive and the person killed being described as the prisoner's wife and no objection made to the evidence or motion to exclude it, the prisoner could not have been misled, &c."

In the present case the evidence was objected to, and there was nothing in the indictment descriptive of the party alleged to have been injured, except the name. The offense is for shooting, at a particular person, and the proof is that the accused shot at another and different person. If the indictment can be sustained upon the proof then the same is altogether immaterial. One may be indicted for shooting at A and convicted of shooting B. An indictment and conviction for shooting T. P. Lewis would be no bar to an indictment for shooting Thomas P. Lewis. In the case of *Nunley vs. The Commonwealth*, 1st Bush, page 11, a party was charged in the indictment with shooting Stephen Daniel's hog, and the proof was that he stole the hog of Philip Daniel. This court held that the conviction was improper and that the offense charged was entirely different from the offense proven. In the present case the attorney for the Commonwealth attempted to remedy the defect by entering upon the record the real name of the party injured. There is no provision of the Code authorizing such a proceeding, if so, every defective indictment could be cured in the same way. There is a provision of the Code authorizing the Commonwealth by her attorney, when the name of the defendant is improperly alleged, to have the proper name given, by an entry on the record. This is in Section 124. The judgment of the court below is reversed and cause remanded for further proceedings in conformity with this opinion.

Johnson, for appellant.

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JOHN T. BOUCHER v. JESSE SATTERFIELD.

Exceptions—Bill of—Verdict Contrary to Evidence.

In the absence of a statement in a bill of exceptions that it contained all the evidence heard on the trial in behalf of both parties, the court of appeals will not reverse.

APPEAL FROM CALDWELL CIRCUIT COURT.

December 12, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

It may be inferred from what is stated in the bill of exceptions that it contains all the evidence adduced on the trial by appellant, but there is no statement that it contains all the evidence heard on the trial on behalf of appellee. And in the absence of such statement this court can not reverse a judgment because it is founded on a verdict rendered contrary to evidence.

All the instructions given appear to have been asked by appellant, or if not they were not objected to, and they appear as favorable as he was entitled to have them. And as no available error for reversal is presented, the judgment is *affirmed*.

Lyle, G. W. Duvall, for appellant.

Hewlett, for appellee.

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C. N. COOPER v. W. J. LISLE, ASSIGNEE.

Principal and Agent—Unauthorized Acts—Ratification.

Where an agent is authorized to borrow money on time, but gets it on call, the principal ratifies his action by accepting it.

Exceptions—Bill of—Time to File—Extension.

The judge, during a term in which the judgment was rendered, gave the appellant until the third day of the next term to file the bill of exceptions which was the proper time to file it.

APPEAL FROM MARION CIRCUIT COURT.

December 15, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

Mahon & Brown were merchants in Marion county, and the appellant, Cooper, was in their employ. They had applied to one Hill for the purpose of borrowing \$200, and in order to obtain the loan sent the appellant to get the money. When the appellant arrived at Hill's he refused to loan the money, stating that what money he had on hand was for the purpose of paying the appellant and others who were entitled to it from the estate of their father, who was dead, and Hill was liable in some way for the money. Hill, however, agreed to let Mahon & Brown have the money in the event the appellant would deduct from the amount that was coming to him from Hill the amount appellant owed Mahon & Brown, which was seventy-two dollars. Cooper agreed to this, obtained a check for \$200 payable to Mahon & Brown, and upon which they obtained the money. The money to be paid back to Hill by Mahon & Brown when called for. It seems that the appellant, Cooper, paid to Hill the amount of the account that he owed Mahon & Brown by crediting Hill on the amount he was owing appellant out of his father's estate. This, in fact, was the original agreement between Hill and the appellant when the money was loaned and \$72.83 of the money Brown & Mahon obtained was appellant's money. Hill only collected in the distribution of the assets of Mahon & Brown his pro rata portion on the \$200 less by the credit of \$72.83. Mahon & Brown's debt has

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been paid by Cooper to the extent of \$72.83, and now the assignee of Mahon & Brown seek to recover the amount of the account due by appellant to him as assignee of Mahon & Brown and refuse to allow the amount paid Hill as a set-off. We are inclined to think that the firm of Mahon & Brown knew how this money was obtained. They deny that they authorized Cooper to borrow it, to be paid on demand, but still they accepted it, and must be bound by the terms thereof. The authority delegated to Cooper was to borrow it for a few weeks, but Cooper disregarded this authority and borrowed it to be paid upon call, as the witness expresses it, and by agreeing to surrender two dollars of his own money in Hill's hands in order to get it. The set-off should have been allowed. The bill of exceptions were filed at the proper time. The judge, during the term at which the judgment was rendered gave the appellant until the third day of the next term to file the bill of exceptions. No bill of exceptions could have been filed at the criminal and equity term in June, and on the third day of the first term succeeding the one at which the judgment was rendered the bill of evidence was filed. The judgment of the court below is reversed, and cause remanded with directions to grant the appellant a new trial, and for further proceedings not inconsistent with this opinion.

C. A. Johnston, for appellant.

Lisle, for appellee.

WM. JENNING'S v. JESSE QANTIS' EXOR., &CO.**Judicial Sales—Failure to Make Proper Application of Proceeds—Remedy.**

Where the proceeds of a judicial sale are improperly applied, the remedy is to apply to the court for a proper application and not by excepting to the sale.

APPEAL FROM GARRARD CIRCUIT COURT.

December 18, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

On the 12th of July, 1871, when appellant filed his answer, in

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which he admitted his indebtedness to G. F. Burdett, he knew he was obligor in the note bearing date March 31st, 1871, which the bank held; that it had four months to run from its date, and was unpaid when the answer was filed and the judgment was rendered for a foreclosure of the mortgage. He should then have stated the facts, and asked the court to have the proceeds of the sale of his land applied to the payment of this debt.

That he failed to do and after the judgment was rendered again renewed the note, if from any facts or circumstances subsequently developed he discovered that Burdett intended to use the proceeds of the sale, and not apply them to the discharge of the debt, his remedy would have been by an amended pleading, and not by excepting to the sale; the purchaser was no party to the controversy, and the remedy of the apprehended injury was not by setting the sale aside, but to have the proceeds properly applied.

Wherefore, the judgment is *affirmed*.

McKee, Hopper, for appellant.

Dunlap, for appellees.

COMMONWEALTH v. JOHNSON A. STORY.**Criminal Law—Appeal—Amount of Fine—Jurisdiction.**

The court of appeals has no jurisdiction in cases where the penalty is a fine of fifty dollars or less and no other punishment.

APPEAL FROM BOONE CIRCUIT COURT.

December 9, 1871.

OPINION OF THE COURT BY JUDGE HARDIN:

The Commonwealth prosecutes this appeal for the reversal of a judgment, rendered for the defendant, on the trial of an indictment, under the act of March 2, 1860, for (Myers Suppl. 517) selling whiskey to a minor without lawful authority to do so.

The indictment alleges but one offense, for which the prescribed penalty is a fine of \$50, and no other punishment.

By section 342 of the Criminal Code of Practice, as rendered March 1, 1860, the jurisdiction of this court in prosecutions for

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misdemeanors is limited to cases in which the punishment may exceed a mere fine of \$50. It results, therefore, that this court has not jurisdiction in this case.

Wherefore, the appeal is dismissed.

J. W. CARDWELL, &C., v. THOMAS J. MOORE, GDN., &C.

Guardian and Ward—Action in Infant's Name.

An action against a guardian for money found due an infant must be brought in the name of the infant by his then guardian or next friend.

APPEAL FROM MERCER CIRCUIT COURT.

December 19, 1871.

OPINION OF THE COURT BY JUDGE PETERS:

This suit was brought by appellee in his own name as the statutory guardian of Lelia Taylor against Cardwell, her former guardian, and James Taylor, his surety, to recover the amount found on settlement in money to be due to the ward by Cardwell.

The defendants below demurred to the petition. Their demurrer was overruled, and they failing to make further answer, judgment was rendered against them, and they have appealed.

The question presented by this appeal must be regarded as an adjudicated one. In *Anderson vs. Watson*, 3 Met., p. 509, where the same question was made this court held that before the Code, such a suit as the one under consideration must have been brought in the name of the infant by his next friend.

Now it may be brought by his guardian, or next friend, *Code section 53*. But it must be brought in the infant's name.

It results that the judgment must be *reversed*, and the cause remanded, with directions to sustain the demurrer to the petition, and for further proceedings consistent with this opinion.

Kyle & Poston, for appellants.

Thompson, for appellees.

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CAMPBELL & IRVINE v. C. W. MITCHELL.

Attachment—Motion to Quash Levy Grounds Stand Denied—Burden of Proof.

No pleading is necessary other than the notice stating the grounds upon which a motion to quash a levy is based. All the grounds stand denied, and it is necessary that the party making the motion should establish their existence by competent testimony.

APPEAL FROM MARION CIRCUIT COURT.

December 19, 1871.

OPINION OF THE COURT BY JUDGE LINDSAY:

At the August term, 1870, an order was made quashing the levy made in virtue of the order of attachment, and also discharging the attachment itself.

The attachment was reinstated by one of the judges of this court, and upon final hearing was sustained.

The error complained of is that the court refused to order a sale of the attached property taken under the levy quashed as aforesaid. The evidence heard by the circuit court warranted the conclusion that the property in question was exempt from levy and sale under either execution or attachment.

The only question is whether or not this fact can be inquired into upon a motion or sale. The court was called upon to sell the property. It had no right to sell property not subject to levy and sale, nor had it the right to retain possession of such property improperly and wrongfully seized by its officer.

No pleadings were necessary, other than the notice stating the grounds upon which the motion to quash the levy was based. All these grounds stood denied, and it was necessary that the party making the motion should establish their existence by competent testimony.

The motion to quash was not a proceeding by a claimant of the property, but by the defendant in the action. It did not raise any question as to the right of plaintiffs to recover, nor as to their right to have their attachment, but only as to whether the levy was legal or illegal. If the process of the court had been abused, it

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was proper that this fact should be inquired into in a summary manner, and the above corrected at once.

The judgment appealed from is affirmed.

Russell & A., R. & F., for appellants.

Lisle, Harrison, for appellee.

ALEXANDER HUNTER, &C. v. GEO. W. HUNTER, &C.**Judgment—Suit to Review—Petition—Demurrer.**

The petition was clearly defective, as it failed to allege the discovery of any of the facts set forth as a cause for reviewing the judgment already rendered, after its rendition, nor attempts to account in any way for failure to except to the commissioner's report in the original suit.

APPEAL FROM NELSON CIRCUIT COURT.

December 20, 1871.

OPINION OF THE COURT BY JUDGE PRYOR:

The petition in this case is for the purpose of vacating a judgment rendered between the same parties and involving the same matters and rendered by the Nelson circuit court in the year 1870.

The petition in which the original judgment was entered, was filed by some of the heirs of William Hunter, deceased, against their co-heirs and Alexander Hunter, his Administrator, in which they seek to make the Administrator liable for assets that he had failed to report, and for a full and final settlement of the estate and a distribution thereof between the heirs—all of whom are before the court.

A judgment was rendered by which the rights of all the parties was determined. The suit was filed in August, 1865, was referred to the commissioner for settlement in the same year and no final judgment rendered until the year 1870.

The present petition for the purpose of reviewing this judgment alleges the same facts set forth in the original petition. and also alleges that there was a combination between one of the heirs, Craycraft and wife, and the administrator, by which the

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other heirs were deprived of their real interest in the estate. The appellant filed a demurrer to their petition and the same was overruled; the administrator then filed an answer, controverting all the allegations of the petition. The cause was submitted upon the petition and answer, and a judgment rendered vacating the original judgment between the parties.

The petition was clearly defective, as it failed to allege the discovery of any of the facts set forth as a cause for reviewing the judgment already rendered, after its rendition, nor attempt to account in any way for their failure to except to the commissioner's report in the original suit, except that they regarded it as a friendly suit, and gave it no attention on that account. They show an entire absence of diligence on their part in the protection of their rights in the former suit, and in the present action, conceding the petition to be a good one, they submit the case for hearing upon the petition and answer, the latter controverting all the allegations of the petition, and the only proper judgment that could have been entered would have been, dismissing their petition.

It was not necessary for the administrator to have had process served on his answer in which he set up payments, and demands against the heirs. In a petition by a distributee and administrator or by legatees for the settlement of an estate, the parties interested have the right to require a judgment settling and disposing of the entire fund, their interest being derived from the same source, and all interested in a common fund. 1st B. Monroe, 230. In this case, the claims the administrator filed against the heirs, whether as payments by him as administrator, or an indebtedness by them, to him, were presented to the commissioner; if improperly allowed the remedy was by filing exceptions to the commissioner's report.

If the administrator had filed no answer at all, in a settlement upon an order of reference of his accounts, he had the right to present his claims against the heirs who were entitled to the fund, and if improperly allowed the remedy is not by a petition for a new trial, but by exceptions to the report of the commissioner.

No sort of diligence has been shown by the appellees, and no reason given in the petition for distributing the original judgment.

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The judgment of the court below is reversed with directions to dismiss appellees' petition.

Johnson, for appellants.

Muir & Wickliffe, for appellees.

DANIEL CRIDER v. R. L. COBB, &C.

CHAS. ANDERSON v. R. L. COBB, &C.

Deeds—Error in Description—Differs from Patent—Mistake—Possession.

The boundary of land described in the deed differs essentially from those described in the patent, but the size of the tract, the water course upon which it lies, the land it adjoins and the further fact that it is described as the same land covered by the patent, tends to establish the conclusion that the intention was to convey all the land embraced in the patent. (

APPEALS FROM LYON CIRCUIT COURT.

January 3, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

Although the boundaries of the land described in clause No. 10 of the deed from C. C. Cobb to Cobb, Bell & Co. differ essentially from those described in the patent to John Scott, there can be no doubt entertained but that the land conveyed was the two hundred acres patented by said Scott.

The side of the tract, the water course upon which it lies, the lands it adjoins, and the further fact that it is described as the same land conveyed by John Scott to C. C. Cobb & W. B. Machen, all tend to establish this conclusion. The appellant Crider was therefore properly adjudged to surrender his possession. He was also properly denied compensation for his improvements.

He had no reason to believe himself the owner of the land in question. He must have known at the time he made his entry and took out his patent, that the land had already been patented to Scott, and he was equally as well apprised as to the character of the title he bought from his vendor Hunter. He does not deny

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that all the lands held by him were embraced within the patent of Scott.

This was not an action to recover under an adverse interfering entry survey or patent, but under an older patent covering all the lands embraced by the junior patents. Besides this, the junior patents were taken out with knowledge of the fact that the lands were covered by the older. They must be treated as void. The seven years limitation law, does not apply in such a case.

The judgment as to Crider must therefore be affirmed. The answer and cross petition of Anderson charges substantially that the land in controversy was sold by R. S. & G. D. Cobb, surviving partners of the firm of Cobb, Bell & Co. to Kelly & Co., and that they intended to convey the same by their deed to the latter firm; that the land was considered part of the Swanee furnace land, and was intended to be conveyed, and that it was improperly described or omitted through the mistake of the draughtsman, Glenn. That Kelly & Co. took possession under their purchase in 1846, and that the Cobbs recognized their title, and asserted no claim until this suit was instituted, in 1868.

The Cobbs deny these charges in general terms, but do not deny that the tract in controversy was omitted from their deed to Kelly & Co. through the inadvertence of the draughtsman, Glenn. The evidence shows that the Kellys did exercise control over the land from the time of their purchase from Cobb, Bell & Co., in 1864, up to the time of their assignment in 1858. It also shows that during this time Cobbs not only did not assert claim to the same, but spoke of it as belonging to Kelly & Co., and stated that they owned no lands in that neighborhood. The mistake of the draughtsman of the deed can readily be accounted for by the mistake as to the boundaries of the tract as given in the deed from Cobb to Cobb and Machen. Without further analyzing the testimony, we are satisfied that this land was sold by Cobb, Bell & Co. to Kelly & Co., and omitted from their deed by mistake. Anderson, who held under the latter and who had been brought into court by Cobbs, had the right in this action not only to assert his claim, but to have such relief against them as will quiet his title.

It was not necessary that Anderson should have exhibited the suit of Wadlington & Others vs. Kelly & Co. The Cobbs allege

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in their amended petition that there had been such a proceeding that Anderson held title by a deed from a commissioner of the court made in execution of its payment.

The deed is exhibited, and appears to have been approved and certified for record. In the absence of evidence to the contrary we must presume that the proceedings of a court of competent jurisdiction were sufficiently regular to invest Anderson with the title of the Kellys.

The question cannot be raised here for the first time, that the Kellys were necessary parties to the litigation between the Cobbs and Anderson. This objection should have been made in the court below by demurrer to the cross petition.

The judgment of the circuit court dismissing Anderson's petition is reversed and the cause remanded with instructions to adjudge to Anderson the possession of the tract of land, and to quiet his title thereto, and for other proper proceedings.

Scott, J. G. Husbands, for Anderson.

Marble, for appellee.

HENRY F. JAMES, &C. v. HENRY STONE, &C.

Executions—Senior and Junior—Levy Priority—Application of Proceeds of Sale—Apportionment—Sheriff Responsible for Error.

The law requires the sheriffs shall first satisfy the scire facias which comes first to his hands, and when two or more executions come to his hands at the same time he shall apportion the sum made among the several executions according to the amount realized.

Same.

If a sheriff undertakes to make what in his judgment is an equitable apportionment between execution creditors he is liable on his official bond for error.

Same—Over-Payment of Creditor—Sheriff Responsible.

Where a sheriff over-pays one of several execution creditors and the money realized from the sale is not sufficient to satisfy all the executions he is responsible to the other creditors in proportion to the amount over-paid.

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APPEAL FROM MERCER CIRCUIT COURT.

January 4, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The appellant, James, was sheriff of Mercer county, in the year 1866, and whilst acting as such various executions for large sums of money issued from the clerk's office of that court in favor of the Bank of Kentucky, Lillard, as guardian, Mary Morgan and the Savings Institution against J. W. Morgan, Herval Gose, etc.

These executions were placed in the hands of the appellant, as sheriff, for collection. The three executions first named, viz., those in favor of the Bank of Kentucky, Lillard and Mary Morgan were replevied by the defendants with the appellees as their sureties in the replevin bonds. The execution in favor of the Savings Institution was issued upon a judgment obtained on a note or bill, for which the appellees were originally bound as sureties. That judgment was against all the parties to the bill, including the appellees. Executions were issued on the replevin bonds in all the cases, and levied upon a tract of land, and some personal property owned by Morgan and Gose. After these executions were issued and levied on the property of the defendants in the executions, two other executions issued from the same court, one in favor of James Hardin against Herval Gose and I. W. Morgan, and the other in favor of Sallie Burns against H. Gose and others. These last executions were placed in the hands of the appellant, as sheriff, and he also levied them upon the same tract of land upon which he had levied the first executions already named. The appellees were not on the executions in favor of either Hardin or Sallie Burns, or liable for the same in any way. On the first named executions, as between the parties against whom they had issued, they were only liable as sureties. The land and personal property of Gose and Morgan, who, as between the parties to the executions, were the real debtors, was not sufficient to satisfy all the executions, the appellant, as sheriff, had against them, and the appellant applied the proceeds of sale to the payment of the two junior executions in favor of Hardin and Mrs. Burns, by which these executions

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were satisfied, and the balance he applied to the payment of the senior executions, for which the appellees were liable as sureties, leaving a balance due on these executions, that were first issued and first levied, of \$1,800, and the appellant, as sheriff, having also levied on the land of the appellees sold their land to raise that sum.

The appellees then instituted the present action against the appellant, as sheriff, and his sureties upon his official bond, alleging that they were only liable on the executions that were first placed in the sheriff's hands, and first levied upon this property as sureties, of which fact the appellant was cognizant, and that he was guilty of a breach of his official bond in not applying the proceeds of the sale of the property of Morgan and Gose, first to the satisfaction of the executions that were first placed in his hands, and first levied upon the property, and that his failure to do so has caused them to pay \$1,800, etc.

"The law requires that the sheriff shall first satisfy the scire facias, which comes first to his hands, and when two or more executions comes to his hands at the same time he shall apportion the sum made among the several executions according to amount, etc."

The duty of the sheriff by this statute is clearly defined and easily understood, and if he undertakes to make what in his judgment is an equitable apportionment between execution creditors, he must be held responsible if in error.

In this case the appellees were sureties upon all the prior executions they were first in date, and placed in the hands of the appellant, as sheriff, and levied by him before the two executions in favor of Harding and Mrs. Burns were issued.

These sureties by the application of the proceeds of the sale of this property to the payment of the junior executions, have been compelled to pay not the debts for which they were liable, but the junior executions for which they were not responsible in any way. These securities were doubtless looking to this levy and sale under the executions for which they were liable, as a means of saving them harmless and releasing them from responsibility.

The property was amply sufficient to pay every dollar of the debts for which they were bound; the lien had already been created upon the property by the levy, and any action on the part of the sheriff, depriving them of the proceeds of the sale

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without their consent, made him liable to the extent of the injury sustained by them.

The result of the sheriff's action was to compel these sureties to pay the balance of the debt. This court in the case of *Staten & Others vs. the Comlth.*, 2 Dana, page 399, says: "that when a sheriff satisfies a junior execution with monies arising from the sale of the principal's property, which was liable to the senior execution first placed in the sheriff's hands in consequence of which the property is afterwards taken and sold to satisfy the senior execution that the sheriff is liable to the surety in damages."

This doctrine is re-affirmed by this Court in the case of *Rowe vs. Williams*, 7 B. Monroe, page 205. The case of the Comlth. for *Tiffany vs. Hurt & Others*, 4th Bush, page 65, is not applicable to the question involved in the case we are now considering; the rights of sureties in executions were neither discerned or decided in that case.

The appellant, however, insists that at the time of the levy by the sheriff of the senior executions on the tract of land belonging to Gose, that he had only the equitable title to twenty acres of the tract, and that after these senior executions had been returned, and whilst the junior executions were in his hands the defendant, Gose, by writing consented that this equitable interest should be sold, and that this consent connected with the writing executed, gave to the junior execution a lien on the twenty acres. The levy on this twenty acres with the senior executions, was not void but voidable only and in addition to this levy, the defendant in the executions, Gose, directs the sale of this twenty acres by the following writing: "Whereas, H. F. James, sheriff of Mercer county, has divers executions in his hands against my estate and others from the clerk's office of the Mercer circuit court which have been levied on my land were for cash and some on a credit, and whereas, there is twenty acres of land on which my dwelling house stands, for the conveyance of which I hold Joseph Morgan's title bond, all the purchase money has been paid by me, now, I authorize the sheriff to sell said twenty acres of land, with 139 $\frac{3}{4}$ acres for which I hold Morgan's deed, on which land said sheriff has levied said executions, the land to be sold to pay debts giving priority to the liens as made, etc."

This writing had reference to the executions that had been

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returned to the clerk's office, after having been levied and without any sale, as well as the two junior executions then in the sheriff's hands. The junior executions had also been levied before this writing was executed and the consent of the owner that the twenty acres might be sold gave to the sheriff no right to appropriate the proceeds of this twenty acres to the payment of the junior executions, but on the contrary, the writing expressly requires that the proceeds shall be applied, "by giving priority to liens as made."

That the writing evidently refers to all the executions that had been levied, is made certain from the fact that it recites "that some of the executions were for cash and some on a credit." Now the senior executions were issued on replevin bonds and the junior executions were not, showing clearly that the object of the writing was to ratify the levies made of all the executions on the land including these returned to the office as well as those in the sheriff's hands.

The appellant also increased the liability of the sureties by paying to the Bank of Kentucky \$348 more than the Bank was entitled to, by its execution; the bank debt was paid out of the property levied on to pay these various executions and if the appellant paid out of the proceeds of sale more money than the execution creditors were entitled to, when the proceeds of sale were not sufficient to pay all the debts, it increased the liability of the sureties to that extent, and if the appellant had not paid the bank this \$348 to which the bank was not entitled, the securities would have had that much less to pay.

The questions made, however, as to the over-payment to the bank, and the amount retained by the appellant for Morgan's taxes, were not decided, as the appellant is liable for the amount of money paid by the appellees, as sureties, in satisfaction of these executions less the amount collected by them in the suit vs. Morgan.

The effort upon the part of the appellees to recover by suit from their principals the amount of money paid as their sureties is no bar to the present action. They had the right to pursue their principals by either a legal or equitable proceeding to indemnify them for the loss they sustained in paying the money, and the appellant ought not to complain, as the amount recovered back from the principals inures to his benefit and relieves him from the payment of a large sum of money.

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We perceive no error in the judgment of the court below. The appellees paid \$1,850 on the 1st of January, 1867; they collected of Morgan \$1,100 on the 7th of September, 1868, and the amount of the judgment should be for \$1,850, with interest from its payment subject to the credit of \$1,100 paid 7th of September, 1868. The chancellor renders the judgment for \$1,406, with interest from 1st January, 1867, subject to a credit of \$611, paid 7th of September, 1868; by calculating the accounts upon each basis up to the date of the credits the same results will be produced.

The judgment of the court below is affirmed.

C. A. Hardin, A. Harding, Bell, for appellants.
Thompsons, for appellees.

J. W. BERRY v. COMMONWEALTH.**Criminal Law—Arrest of Judgment—Neglect of Children—Sufficiency of Indictment.**

The only grounds on which a judgment can be arrested is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the courts. Second. An indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended. Third. The indictment is fatally defective because there is no allegation that the children were in the custody and control of the father, or unable by reason of their tender years to provide food and clothing for themselves.

Assault—Sufficiency of Indictment.

An indictment for assault is defective where it fails to allege that the person assaulted was in striking distance of the person making the assault.

Gaming—Indictment.

An indictment against one for suffering gaming in his house is defective where it fails to allege that at the time of the gaming the house was in the occupation or under the control of the party charged with the offense

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APPEAL FROM BOURBON CIRCUIT COURT.

January 5, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

This is an indictment against J. Wesley Berry in which he is charged with being guilty of inhuman treatment to his family as follows, viz: "*The said J. Wesley Berry on the 21st day of October, 1870, in the county aforesaid unlawfully and inhumanly neglected to furnish sufficient food and clothing for his children, they being under age, as well as to provide medical attendance and medicines for the same, he being amply able to do the same, against the peace and dignity of the Commonwealth of Kentucky.*"

The appellant plead not guilty to the indictment, and upon this issue, the jury returned a verdict against him for seven hundred dollars. The appellant then made his motion in arrest of judgment, and this motion was overruled to which he excepted, &c. The refusal to arrest the judgment is the material question in the case and will alone be considered. The only ground upon which a judgment shall be arrested is "that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the Court," Sec. 271 Crim. Code.

An indictment must contain a statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, Sec. 121 Crim. Code. The indictment is fatally defective. There is no allegation that the children were in the custody and control of the father, or unable by reason of their tender years to provide food and clothing for themselves. Because the child is under age it does not necessarily follow that he is either in the custody, care and control of the parent or unable to provide food and clothing suitable to his or her condition in life. There is no statement in the indictment that the child or children required medicine, or that they were destitute or suffered for the want of either food, clothing or medicine. If the father refused to provide food and clothing for his children, and they were furnished out of their own means, or rendered comfortable by others, the father is not sub-

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ject to an indictment. A mere statement in an indictment that the father refused to provide food and clothing for his child, is not equivalent to an allegation that the child thereby suffered from cold or hunger. If the indictment can be maintained (and this question is not now before us) the Commonwealth must not only allege the want of parental kindness and care, but also the injury resulting to the child or children by reason of this inhuman treatment. A person of common understanding, as insisted by the attorney for the Commonwealth, would know what was intended and meant by the statement 'that the appellant refused to provide for and clothe his children, and whilst we concur with him in this suggestion, still the provision of the Code, to which the attention of the court has been called, not only requires that the language of the indictment shall be so plain as to enable a person of common understanding to know what is intended, but also makes it essential that the indictment must contain a statement of the acts constituting the offense, and of course means a public offense. If in an indictment for an assault, it is alleged that A assaulted B it would be understood that an assault was made, but this statement does not present facts constituting an offense for the reason that the indictment fails to state that the person assaulted was within striking distance of the person making the assault, or in an indictment against one for suffering gaming in his house with cards, &c., this is not sufficient because the acts alleged, do not constitute a public offense, and to make the indictment in such a case good, it must allege that at the time of the gaming the house was in the occupation or under the control of the party charged with the offense. We are of the opinion that the accusations contained in the indictment against the appellant, do not constitute a public offense. The judgment of the court below is reversed and cause remanded with directions to dismiss the indictment.

McMillan, for appellant.

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JAMES BUCKMAN v. JAMES CLARKSON'S ADMR.

Judicial Sales—Writ of Possession.

Where land is sold under an execution, possession of the land must be recovered by an action at law prosecuted in the county where the land lies.

APPEAL FROM WASHINGTON CIRCUIT COURT.

January 5, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

It is not necessary in this case to determine whether or not the settlement of appellant as guardian of J. R. Clarkson, deceased, as corrected and admitted to record by the Washington county court is conclusive upon him in this litigation.

It is certainly prima facie evidence between the parties to this suit. And as appellant failed to show that he was charged in said settlement with monies he had not received, the court below did not err in holding him liable for the full amount charged against him in such settlement. It was not necessary that appellee should reply to the answer of appellant except in so far as it sought a judgment over against him for one hundred and thirty dollars claimed to have been overpaid to the ward.

The denials of the correctness of certain charges embraced in the settlement was mere matter of defense, and the credits claimed on account of the pretended receipts Nos. 1, 2, 3 and 4, were pleas of payment, and in no sense either set-offs or counter-claims.

The court below did not abuse its discretion in setting aside the order of submission, and permitting appellant to reply as to the amount claimed as an over-payment.

The burden of proof was upon appellant to show that the four receipts rejected by the county court and relied on in this case were genuine. The testimony of the two witnesses by whom he attempts to show that the signatures to said receipts are the genuine signatures of J. R. Clarkson is unsatisfactory and of but little value.

An examination of the original papers persuade us that

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James R. Clarkson either did not know how to spell his own name or else that he did not write the signature attached to the disputed papers. In the receipt of the 3rd of October, 1860, the letter "r" is wholly omitted in spelling the name of Clarkson. The same mistake was made in the receipt of 10th of May, 1859, except that the letter "a" was omitted instead of the letter "r," this awkward mistake was corrected by placing the letter "a" immediately above the letter "r."

Then in the receipt of the 21st of July, 1861, the letter "a" is omitted from the first name James. If these mistakes were made by the ward, then it follows that there was no letter, similarity in his signatures, made at different times that it was impossible for any one to swear to them with any degree of confidence.

In addition to all this there is a suspicious similarity in the appearance of the form slips of paper upon which the receipts were written.

These circumstances, considered in connection with the statements of appellant, that he wrote and signed the receipts himself, completely rebuts any proof that may conduce to show that they were signed by Clarkson.

Appellant wholly fails to prove that he was authorized by his ward to sign said paper. He does not prove that he made any such payments, or, indeed, any payments, over and above such amounts as Clarkson may reasonably be supposed to have earned by his labor. Under such a state of facts the circuit court could not have refused to give judgment for the amount shown to be due by the settlement, and as to such amount the judgment appealed from is affirmed.

Pending the litigation the appellee filed his affidavit under the provisions of Sec. 11, Civil Code, and appellant failing to give the required security, or to pay into court the amount claimed against him, executions were sued out, and certain real estate of appellant situate in Union county levied on and sold, such real estate was purchased by appellee.

Upon final hearing the amounts realized upon the sales made under the executions were properly credited upon the judgment, but the court went further and awarded writs of possession in favor of appellee.

To this extent the judgment is erroneous. The lands were not sold under a judgment or decree in the action, but under

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execution, and by the sheriff of a distant county, and officer of another court. The pleadings of appellee did not ask for any such relief, and none such could properly have been afforded by the Washington circuit court, even if it had been asked for. Appellee must recover the possession of these lands, by an action at law prosecuted in the county where they lie, in so far as the awarding of these writs of possession are concerned, and to no greater extent the judgment appealed from is reversed. The cause is remanded for further proceedings consistent herewith.

Harrison, for appellant.

Thurman, James, for appellee.

JOHN A. HIGGINS v. SAMUEL J. KITTRELL.

Depositions—Exceptions—When to be Made.

Exceptions to depositions must be noted and filed before the commencement of the trial.

Same.

Exceptions made before the examiner will not be considered, except so far as it may affect the competency of the witness, and such exceptions may be made by motion at the trial.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 5, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The testimony in this case conduces strongly to show that the appellant was induced to abandon his right to enter upon and take possession of the farm rented of the appellee for the reason that he was unable to work it for the want of hands and the disturbed condition of the country at the time. He obtained possession of some part of the stock, and there is no reason appearing in the record why he did not take possession of the farm except the suggestion already made.

Greenhow, who seems to have cultivated a part of the farm after he understood that the appellant had declined to take pos-

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session, says that there was no obstacle in the way of appellant's entering upon the property, and that he, Greenhow, had no right to cultivate the place or to hold the possession, and was induced to assume the control he did, because it was abandoned by every one else.

The court very properly refused to permit the witnesses to speak of the lease, for the reason, that there was no effort on the part of the appellant to procure the lease, or to take the depositions of those who were presumed to know all about it.

The fact that these parties to whom this alleged lease is said to have been made were hostile to the appellant is no reason why he should not have taken their testimony. It is not to be presumed that mere hostility upon the part of a witness to a party litigant would induce him to swear falsely. Greenhow, to whom the lease is said to have been given, swears that he never held, or obtained, such a lease and that he went upon the farm some months after the appellant rented it.

The court also properly excluded from the jury the deed offered in evidence, as there was no proof showing that it embraced the land in controversy, or that the party to whom it was sold was in the possession of the land, or claimed the possession.

Exceptions to depositions must be noted and filed before the commencement of the trial. This is required in order that the adverse party may have notice of the exceptions made. before the examiner will not be considered, except so far as it may affect the competency of the witness, or competency of the testimony, and such an exception may be made at the time the witness is introduced or his deposition offered, or the testimony be excluded on motion.

The instructions given by the court to the jury for the appellant were all more favorable than the law or facts authorized, but as there was some proof showing that the appellant failed to get all the stock he had purchased, and the jury being the sole judges of the facts, we are not inclined to disturb the verdict, although the evidence is very weak upon which the jury saw proper to deprive the appellee of his interest on the note.

The judgment is affirmed upon both the original and cross-appeal.

Waters, for appellant.

Allen & Morton, for appellee.

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CATHERINE BUCKNER v. COMMONWEALTH.

Criminal Law—Evidence—Confession—Competency — Admissibility — Instructions.

It is not error to refuse to instruct the jury that confessions made alone to one witness constitutes the weakest evidence admissible in law. The proof of confessions so made is evidence which should be carefully scanned; but the confessions themselves, if freely made, and satisfactorily proved, are entitled to the greatest weight.

Arrest of Judgment.

A judgment of conviction in a criminal case can be arrested only because the indictment does not charge facts constituting a public offense within the jurisdiction of the court.

APPEAL FROM GREEN CIRCUIT COURT.

January 6, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

It appears from the record that the grand jury returned into court the indictment charging appellant with the commission of the offense for which she was subsequently tried and convicted. The presumption is that it was presented by the foreman. It is not the province of this court to pass upon the sufficiency of the evidence upon which the verdict of the jury was founded.

The circuit court did not err in refusing to instruct the jury that confessions made alone to one witness constituted the weakest evidence admissible in law. The proof of confessions so made is evidence which should be carefully scanned; but the confessions themselves, if freely made, and satisfactorily proved, are entitled to the greatest weight.

Nor did the court err in refusing the second instruction asked for by appellant.

In the first place, the admissibility of the evidence conducing to prove the confessions of the accused was one to be determined by the court. Whilst the jury may consider the circumstances attending the making of confessions, in arriving at a conclusion, as to the weight to which they may be entitled, they can not refuse to con-

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sider them altogether when held admissible by the court. In this case the proof of the confessions was not objected to, and in law it could not have been properly excluded from the jury.

The instructions given for the Commonwealth were not objected to, when given, and therefore can not be considered by this court.

The motion in arrest of judgment was necessarily overruled.

A judgment of conviction in a criminal case can be arrested only because the indictment does not charge facts constituting a public offense within the jurisdiction of the court.

In this case appellant was charged with feloniously stealing, taking and carrying away two legal tender notes of specified amounts and values, the property of another, and that the acts were committed in the county of Green. Conceding all this to be true, there can be no doubt that a public offense within the jurisdiction of the Green circuit court was charged, although the grand jury were not able to give the number and series of the stolen notes.

Judgment affirmed.

Lewis, for appellant.

Attorney General, for appellee.

ANGELINA ADAMS, &C., v. JORDAN PERKINS, &C.

Judgment—For Sale of Land—Setting Aside—Subsequent Term—Second Judgment for Sale—Suit to Set Aside.

A final judgment can not be set aside at a subsequent term of the court unless for some of the grounds prescribed in the Code. When the order purporting to set aside the first judgment, no sale of the land had been made by the first judgment, the whole of the land was to be sold to pay the debts without regard to the claim of the widow for dower, and it is not proved that the land brought less when sold than it would have brought if it had been sold under the first judgment. Held, That the order setting aside the first judgment may be treated as a nullity and it may be regarded as in full force, the second judgment for the sale of the same land for the payment of the same debts is not necessarily erroneous.

APPEAL FROM GARRARD CIRCUIT COURT.

January 6, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

The will of John Q. Adams, late of Garrard county, was probated in the proper court in March, 1866, by which he devised the use and control of the whole of the remainder of his estate, after the payment of his debts, to his widow, the appellant, Angelina Adams, so long as she remained his widow, and in the event of her marriage she was to have one-third of his estate, and he nominated her as his executrix. She declined to act, and J. M. Higgins was appointed administrator, with the will annexed.

On the 2d of March, 1867, the administrator *cum testamento* filed a petition in equity in the Garrard circuit court against the widow, children and creditors of the testator, alleging a deficiency of personal assets to pay the debts. Asking a reference of the case to the master to ascertain and report the debts of testator, and praying for a sale of as much of the real estate as should be required to pay the debts.

At the February term, 1868, after the master had returned his report, from which it appeared the outstanding debts against the estate amounted to \$5,043.47, after the personal assets were exhausted, a judgment was rendered for a sale of so much of the land owned by testator at his death as would be sufficient to pay said sum with the accruing interest and costs, and a commissioner appointed to make the sale.

Under that judgment no sale was made, and on the 4th of September, 1868, the following order was made:

"The judgment heretofore rendered at a former term confirming the commissioner's report, and ordering the sale of the land, is set aside, and this cause is remanded to the master in chancery to make further report of any other claims against the estate of decedent, and this cause is continued."

At the February term, 1869, a motion was made by some of the creditors to have the land placed in possession of a receiver to be rented out, it having up to that time remained in the possession of the widow. In opposing that motion, she filed her own affidavit, in which she states that she has at all times been willing, and was then willing, that the land should be sold to pay the debts of her husband, and to that end she had made a contract with Jordan Perkins, the principal creditor, and others, that a judgment should be rendered at the present term of this court ordering

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a sale of the whole of the home tract of land, amounting to about 300 acres, provided said Perkins and other creditors would bid as much as \$30 per acre for said land, which they agreed to do, and which would be greatly more than enough to pay off all the debts with interest and costs of suit. And she states that said 300 acres of land is cheap at the thirty dollars per acre; that she believed until within the last month that the agreement aforesaid would be promptly and faithfully carried out, but regrets to have found a spirit in Perkins, and some of the other creditors, to abandon their own agreement, and now by their affidavits are attempting unnecessarily to take the land out of her possession, and to leave her out of doors, and that too after they have thus made and violated their own proposition and promises.

And in another affidavit sworn to by appellant Angelina Adams April 8th, 1870, she repeats the statement that she had made an agreement with Perkins and others to consent to a sale of the land, they agreeing on their part to bid for it \$30 per acre, which she was willing to carry out; but they had refused. And she then insists that the sale should be postponed until she could have time to realize the proceeds from debts in the South owing to her late husband and sufficient to pay all his debts, and which were in process of collection.

At the April term, 1870, of said court Mrs. Adams was adjudged to be entitled to dower in the lands of her late husband, the master directed to lay off and set apart to her *85 acres*, including the improvements, and the residue of the lands offered to be sold, or a sufficiency thereof to pay the debts, and the land was sold. And from this judgment an appeal is prosecuted by the widow and children of said testator.

Certainly no citation of authority is necessary to enlighten this court that after the circuit judge had rendered a final judgment in the case, that at a subsequent term of the court he had no power to set aside, change or modify said judgment, unless for some of the grounds prescribed in the Civil Code—none of which are attempted in this case. But what is sought by this appeal? No judgment had been rendered precluding creditors of testator from coming forward and proving their debts when the first judgment was rendered; they had a right to present and prove their claims, and upon sufficient proof have them allowed and paid. When the order purporting to set aside the judgment for a sale of the land was entered on the 19th of February, 1868, no sale had been made,

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other claims were outstanding, and were afterwards proved; the widow and children occupied the land and appropriated the whole of the proceeds or profits for the year 1868; the widow states in her affidavit she was in possession in February, 1869. And by the statements quoted from her affidavits it must be apparent she resisted a sale of the land, and by the first judgment of sale the whole of the land was to be sold if necessary to pay the debts, without regard to her claim to dower; indeed, she had not then set up any claim to dower; but seems to have elected to abide by the provisions of the will of her husband. It is not alleged, nor is it proved, that the land brought less when sold than it would have brought if it had been sold between February and September, 1868. The order of September, 1868, may be treated as a nullity, and the judgment of February, 1868, for a sale of the land regarded as in full force. Is a second judgment for a sale of the same land, for the payment of the same debts, remaining unpaid, and which must be paid, necessarily erroneous, and to be reversed because of a previous judgment? It is not shown that appellants are prejudiced by the last; the land must necessarily be sold, and when it is sold, if sold according to law, that is an end of it. But the subsequent proceedings in the case show very conclusively that the order of September, 1868, setting aside the judgment of February, 1868, was acquiesced in by all the parties, and especially Mrs. Angelina Adams, who was certainly benefited thereby.

We are not prepared to say that the court abused a sound discretion in refusing to permit the amended answer of Mrs. A. Adams to be filed, even if the paper copied in this record be the same, which, however, we can not regard as such, as there is no order of the *court* nor bill of exceptions to identify it as the same paper tendered.

We perceive no error in the order of the 23d of December, 1870, nor in those of the 12th and 13th of April, 1871, complained of.

Perceiving, therefore, no errors prejudicial to appellants in any of the orders and judgments complained of, the judgments are affirmed.

Bradleys, for appellants.

Dunlap, for appellees.

Opinion of the Court.

COMMONWEALTH v. GEORGE WEBSTER.

Indictment—Including Two Separate Offenses—Lottery.

On examination of the indictment in this case, it will be seen that two offenses are attempted to be charged, but it failed to apprise the defendant for which offense he was to be tried. Held, The acts which are relied on as constituting the offense were not stated in such a manner as to enable the party accused to know for what particular offense he is to be tried.

APPEAL FROM LOUISVILLE CITY COURT.

January 8, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

Appellee was indicted under art. 21, ch. 28, volume 1, p. 405, R. S., for unlawfully promoting a lottery and other things committed as follows: The said George Webster in said State, county, and city on the — day of July, A. D. 1871, and before the finding of this bill, did unlawfully manage, and promote a lottery, and aid in the vending and disposing of divers tickets written, and printed, for lucre, profit, gain, money national bank bills, and notes, treasury notes, and bills of the United States, lottery tickets, the said lottery being for money, and other things of value, and did unlawfully promote, and manage by advice of counsel and aid, and authorize, procure, encourage and command divers and sundry persons to-wit: S. Rothchild, Jared Bull, T. T. Simpson, Jas. Douglass, Jas. J. Douglass, S. N. Stell, J. S. Cave, C. A. Cann, S. Leebennan, B. A. Blotcher, D. W. German, Tom Pain, M. Kendrick, G. W. Ford, G. Coyle, W. Downing, to sell and dispose of and vend said tickets, the same being in the Kentucky State lottery, sometimes called the Frankfort lottery, and the said persons named in pursuance of said advice, command, afterwards to-wit: On the — day of July, 1871, did sell, and dispose of to J. S. Cave lottery and policy tickets for money and other things, the same purporting and being intended to entitle the holder to a prize, and share of an interest in a prize contrary to the statute, etc.

To this indictment a demurrer was sustained, and the Commonwealth has appealed.

Opinion of the Court.

Two distinct offenses are created, and clearly defined by the statute. The first section provides that whoever shall set up, draw, manage, or otherwise promote any lottery for money or other thing or dispose of, or promote the disposing of any money or thing of value by way of lottery, or aid in doing either of said offenses shall be fined from one hundred to ten thousand dollars.

Section 11 provides, that whoever shall write, print, vend or have in possession, with intent for himself or another to sell, or offer to sell, negotiate, exchange or dispose of any ticket, share of a ticket, or any writing, certificate, token or device, purporting or intended to entitle the holder, bearer, or any other person to any prize, or any share, or any interest in any prize, to be drawn in any lottery in or out of this *State* shall be fined for every such offense from one hundred to one thousand dollars.

By even a slight examination of the indictment in this case it must be seen that, both offenses are attempted to be charged, but fails to apprise the defendant for which offense he was to be tried. He might be prepared to defend the one, and be tried for the former.

Nor can the one offense defined in the two sections be deemed a degree of the same offense under *section 259, Criminal Code*.

The acts which are relied on as constituting the offense are not stated in such a manner as to enable the party accused to know for what particular offense he is to be tried, and consequently the indictment is not sufficient. Wherefore, the judgment is *affirmed*.

Bramlette, Bullitt, Bullitt & Harris, for appellee.
Ramsey, for appellant.

COMMONWEALTH v. G. COYLE.**Indictment—Selling Lottery Tickets—Certainty.**

The charge in the indictment is that the defendant "did unlawfully sell a lottery ticket, a writing purporting to entitle the holder to a prize to be drawn in a lottery in the State of Kentucky." Held, That the allegations are too general and wholly fails to give the defendant notice with sufficient certainty of the particular offense, for which he was to be tried, so as to enable him to prepare his defense, nor would a judgment in the case be a bar to a future prosecution for the same offense.

Opinion of the Court.

APPEAL FROM JEFFERSON CIRCUIT COURT.

January 9, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

The charge in the indictment in this case is that the defendant "did unlawfully sell a lottery ticket, a writing purporting to entitle the holder to a prize to be drawn in a lottery in the State of Kentucky, contrary," etc. This certainly is too general, and wholly fails to give the defendant notice with sufficient certainty of the particular offense, for which he was to be tried, nor would a judgment in the case be a bar to a future prosecution for the same offense. He might be prepared to show by proof that he did sell a ticket in a lottery authorized by law, and that he had a right to sell the ticket, but under this indictment appellant could show that he sold a ticket in another lottery, which he might also have been able to prove he had a right to sell if he had been apprised that he was to have been tried for that offense. The demurrer was, therefore, properly sustained and the judgment must be *affirmed*.

Bramblette, Durrett & Briggs, for appellant.

Bullitt, for appellee.

THOMAS BUTLER, &C., v. MELINDA BUTLER.**Descent and Distribution—Death—Subsequent Legislation.**

The right of the widow and heirs in and to the estate of the decedent vested in them, at his death, and no subsequent legislation can divest them of the interest they acquired.

Dower—Failure of Heirs to Allot Cost.

It is the duty of heirs to have the widow's dower allotted her and upon their failure to do so, it was right and proper for her to institute proceedings against them, for that purpose, and the cost of such a proceeding must be paid by the heirs.

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APPEAL FROM JESSAMINE CIRCUIT COURT.

January 9, 1872.

OPINION OF THE COURT BY CHIEF JUSTICE PRYOR:

The act of the Legislature approved the 17th of March, 1870, entitled "An Act for the benefit of the widows and orphans of this State," does not apply to the claim set up by the widow of John Butler, deceased. The right of the widow and heirs, in and to the estate of the decedent vested in them, at his death, and no subsequent legislation can divest them of the interest they acquired. It was the duty of the heirs to have the widow's dower allotted her, and upon their failure to do so, it was right and proper for her to institute proceedings against them for that purpose, and the costs of such a proceeding must be paid by the heirs. The judgment of the court below, so far as it allows the widow, one hundred and sixty-five dollars in lieu of the property she claims by reason of the act of March, 1870, is reversed, and cause remanded for further proceedings not inconsistent with this opinion.

Bronaugh, for appellants.

McKee, for appellee.

BENJAMINE HAMILTON v. HIRAM HICKS.**Exceptions, Bill of—Order Filing Omitted—Nunc Pro Tunc Order.**

The bill of exceptions was signed by the judge at the term during which the judgment was rendered and the motion for a new trial overruled. It was then made part of the record, but the clerk omitted to make an order filing it. Held, That it was proper for the appellant at the next term, upon notice to the adverse party, by motion to have an order Nunc Pro Tunc entered noting the filing.

Judgment—Replevied—Merger.

The execution of a replevin bond is a merger of the judgment and releases all the judgment defendants who fail to sign replevin bond.

Opinion of the Court.

APPEAL FROM FLOYD CIRCUIT COURT.

January 21, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

In this case the bill of evidence was signed by the judge at the term during which the judgment was rendered and the motion for a new trial overruled. It was then made part of the record, but the *clerk* omitted to make an order filing it. It was proper for the appellant at the next term, upon notice to the adverse party, by motion to have an order *nunc pro tunc* entered noting the filing.

The instructions can not be complained of, as there were no exceptions made to the giving of them by the court. There was no evidence, however, on which to base the judgment against the appellant. No express or implied authority was given the appellee to sign the name of appellant to the replevin bond. The debt paid by appellee was not the debt of the appellant, and the execution of the replevin bond was a merger of the judgment and a release of appellant from liability. *Kouns vs. Mann*, 14 B. Monroe 304. The replevin bond had never been quashed, and in fact the debt was paid by the appellee upon an execution issued on the replevin bond. The judgment of the court below is reversed, and the cause remanded with directions to set aside the judgment and award to the appellant a new trial and for further proceedings consistent with this opinion.

J. R. Botts, for appellant.

Apperson & Reid, for appellee.

GEO. CARPENTER v. L. D. GOODE.**Pleadings—Answer—Negative of Averments—Burden of Proof.**

The burden of proof is on the defendant where his answer contains negative averments. Held, That the knowledge of what is alleged, if the averments are negative, is with the defendant and not the plaintiff. By throwing the burden of proof on the party bringing the action he is required to prove, that, which is impossible for him to do. There is, however, a class of cases where, although the averments are negative, in their

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character, the proof or the evidence sustaining the averment is not only within the knowledge of the plaintiff, but as susceptible of proof by him as by the defendant.

APPEAL FROM BOYLE CIRCUIT COURT.

January 12, 1872.

RESPONSE TO PETITION FOR REHEARING BY JUDGE PRYOR:

The labored argument of counsel for the appellant in his petition for a rehearing, and the zeal manifested in behalf of his client's cause, has induced this court to make response. In the consideration of a *case, however insignificant*, the amount involved may be, this court, even in the hurry of business, would be inexcusable in failing to notice a legal question so often decided, and so well understood, and made so prominent by the record, as the question involved in this case, and which, the attention of the court has been again called by the able, but misapplied argument made by counsel in his petition. The original and amended petition presented a cause of action about which there is no question. The object we supposed, in filing the amended petition, was to make the charges more specific, and the breaches of the contract more perfect. The allegations of the amended petition were intended to supply the statements contained in the original, and all, the allegations of this amendment were by the consent of parties traversed upon the record. The answer to the original petition also denies all the allegations of the original petition and concludes with the statement "*that the defendant has fully complied with his obligation in every particular.*"

A plea of non infregit conventioniam was had at common law, and in cases to which such a plea is now applicable, it is clearly defective. If in consideration of a horse delivered, I promise to pay A one hundred dollars, in pleading I must present a defense that shows payment, or some release or discharge originating after the agreement to pay. So if A agrees to deliver a horse upon a certain day, upon a consideration paid, we must either aver a delivery, or allege specially a state of facts releasing him from his obligation, or as in the case of *Barret vs. Crutcher*, 3 Bibb, to which the attention of the court has been called, where a party by his writing obligatory, agreed to pay, or deliver to

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Hesper Mensher, a likely negro man, it was certainly bad pleading to deny, that he had violated his contract, without alleging a delivery, and in the case of *Harrison vs. Park*, 1 J. J. Marshall, an analogous state of facts is presented. In all the cases above given, no plea except that of *non est factum* can well be pleaded without placing the burden of proof on the defendant, for the reason, that it is not within the power of the plaintiff, to prove these negative averments. The knowledge of what is alleged, is with the defendant, and not the plaintiff and by throwing the burden of proof on the party bringing the action, you required him to prove, that, which is impossible for him to prove, as for instance, that the defendant failed to pay him the money, or that the defendant failed to deliver him the negro and in all such cases, the affirmative of the proposition is upon the party whose duty it is to comply. There are a class, however, occurring in every day practice, and the learned counsel, no doubt, engaged in them constantly, where, although the averments are negative, in their character, the proof or the evidence sustaining the averment, is not only within the knowledge of the plaintiff, but as susceptible of proof by him as by the defendant. A, by his writing, sells to B, his horse, and warrants it sound. B brings his action on the covenant and alleges that at the time of the sale, and execution of the covenant the horse was unsound. A denies that he was unsound at the time, &c., but avers that he was then sound. Upon submission of the cause to a jury without proof the verdict must be for the defendant, upon the supposition and for the reason (although the averment is negative in its character) that it is as susceptible of proof by the plaintiff as the defendant. So, in regard to the warranty of soundness, in any other property.

In this case the defendant denies that he failed to dig up the briars, he denies that he failed to put up the rails. He denies that he failed to cut the iron weeds; he denies that he wasted the timber or failed to cultivate the land in a husband like manner, and alleges that he has complied with his covenant in every particular, or in other words, by traverse on the record, denies all of plaintiff's allegations. Now, if in this case the burden of proof is on the defendant, either on the original answer or the traverse, he must prove first, that he has committed no damage by hauling over the plaintiff's land in bad weather, that he has cut no timber; that he has put up all the

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fencing; cut all the briars, and iron weeds before he is allowed to know that evidence may be adduced against him by reason of the alleged breaches of the covenant. These allegations are all susceptible of proof by the plaintiff, and the burden was on him to show a violation of the covenant. He could prove (and it was as much within his power as the defendant) that the briars were not cut. The fencing left in bad condition, and the timber wasted, and looking to the legal ability of appellant's counsel the court would not indulge too much in presumption by determining that the plaintiff assumed the burden of proof in the court below. Upon the whole proof we are inclined to think as recited in the opinion already delivered, that the plaintiff was entitled to mere nominal damages and the petition is therefore overruled.

VanWinkle, for appellant.

Durham & Jacobs, for appellee.

PERRY CROSTHWAITE v. S. S. WIGNER.

License—Federal Government—Transacting Business Without—Contract Not Enforceable.

Contracts made by broker carrying on business without a license from the Federal government can not be enforced.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 13, 1872.

RESPONSE BY JUDGE LINDSAY:

It is not necessary in these cases for this court to express an opinion, as to whether the purchase by the plaintiff from Hunter, of the notes sued on, vested him with the title to the same. If the plaintiff was carrying on the business of broker without paying the license required by the federal government, and this fact, as contended by appellant, rendered his business transactions vicious, then it might follow that he could not have enforced his contract of purchase as against Hunter. But this contract has been fully executed, and Hunter is not complaining. The

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sale of the notes, if void, leaves the title in Hunter, but does not discharge appellants of their obligation to pay him.

Upon the face of the record appellee appears to be the owner of the notes. If, as matter of law, they belong to Hunter, appellants should have asked to have him made a party to the suits. As the record stands, the payment of this judgment will protect them against Hunter. They therefore have no ground of complaint.

Petition overruled.

Gibbons & Falconer, for appellant.

Browne, for appellees.

BOARD OF INTERNATIONAL IMPROVEMENT v. J. V. HALL & WIFE.

**Master and Servant—Liability for Willful and Tortious Acts of Servant—
Ratification.**

The master is not usually liable for the willful and tortious act of his servant. He is non-liaible where the party injured is a stranger unless the act was directed to be done or afterwards ratified by the master.

Same.

The rule is different where the relationship between the master and the party injured is such as implies a contract that no injury shall be inflicted by the servant.

Same.

The appellant was the owner of a turnpike road upon which the appellee habitually traveled. Held, That the law implies a contract upon the part of those traveling on this road to pay the lawful tolls charged, and it also implies a contract upon the part of the appellant that such persons shall not be insulted or outraged by the persons employed to collect these tolls.

APPEAL FROM FRANKLIN CIRCUIT COURT.

January 16, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

The master is not usually liable for the willful and tortious act of his servant. He is never liable where the party injured

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is a stranger, unless the act complained of was done by the servant, while acting within the scope of his employment, or where the act was directed to be done, or afterwards ratified by the master.

The rule is different, however, where the relationship existing between the master and the party injured, is such as to raise, by implication of law, a contract that such injury shall not be inflicted by the servant. The doctrine was carried over further than this in the case of *Hawkins & Co. vs. Riley*, 17 B. Monroe, 101. In that case the party complaining was a stranger to the employers of the servant, who was guilty of a willful wrong, yet they were held to be liable for punitive damages.

In this case the appellant, the Board of Internal Improvements, is the owner of a turnpike road, upon which the appellees habitually traveled. The public were invited to use this road. The law implies a contract upon the part of those traveling on this road to pay the lawful tolls charged by the board. It also implies upon the part of the Board a contract that such persons shall not be insulted or outraged by the persons employed to collect these tolls. If this implied contract is violated, the party injured may recover in any state of case the actual damages sustained, and if the board ratifies the tortious act of the servant, may recover exemplary damages. *Goddard v. Grand Trunk Railway Co.*, and *Shirley v. Billings*, 8th Bush, —.

The cases relied upon by appellants do not in our opinion conflict with this doctrine.

The petition alleges that French was at the time of his tortious act complained of, gate keeper, and that he was still so employed when the suit was instituted, more than four months afterwards. From this continued employment a ratification of the act may be implied. In such a case both the servant and employers were liable for exemplary damages. Hence there is no good reason why, under our system of pleading they might not be jointly sued.

The instructions given at the instance of appellees are in substantial conformity to this view of the law. Instruction H given for appellant was more favorable than it should have been. Instruction B was properly refused. French could not escape the consequences of his carelessness, although he may not have acted willfully. We cannot determine that the weight of evidence is against the finding of the jury.

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Appellees did not ask for separate damages on account of the injury to the buggy. They merely stated the amount of the actual injury to that vehicle. Their prayer was for a gross amount as damages for both the injury to person and property. We therefore do not regard the failure of the court to tell the jury that they could not find greater damages, for the injury to the buggy, than the amount alleged in the petition, as such an error as will authorize a reversal.

Judgment affirmed.

James, for appellant.

Lindsey, for appellees.

JOSH. EUHELBERGER, &C. v. JOHN PFAENDER.

Landlord and Tenant—Lease—Sub-letting—Rent.

Appellants sub-rented the premises and agreed to pay the rent to the landlord. Held, That while the promise does not appear to have been made directly to appellee, still he must be regarded as having affirmed the contract, and there is no reason why he should not recover the rent from appellants.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 16, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

From the evidence in this case it appears that Keibick and Hightower leased the vinegar factory from the appellee by parol for one year with the privilege of extending the lease for ten years, that they entered under their lease and held the premises a short time, and then sublet them to appellants, who, in consideration of a verbal transfer of the lease to them, undertook and promised to pay the rent to appellee.

We perceive no legal reason why appellee may not recover the rent from appellants. It is not denied in their answer that they owe the rent, the evidence shows they promised to pay the same to appellee, and while the promise does not appear to have been made directly to him, still he must be regarded as having affirmed

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the contract, and the judgment for the rent in favor of appellee will bar any action in favor of Keibick and Hightower against appellants for the rent. Consequently they are not prejudiced by the judgment, and the same must be affirmed.

.Hallam, for appellants.

JAMES CALDWELL, v. WILLIAM CALDWELL, &C.

Wills—Construction.

The fact that the testator devised to James five dollars as his share of the estate, does not argue that he no longer recognized him as a child, nor that he did not intend him to share equally with his other children in such balance as might remain of the special provision made for the wife.

APPEAL FROM CAMPBELL CIRCUIT COURT.

January 17, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

Alexander Caldwell, by his last will and testament, after disposing of the greater portion of his real estate by special devise, provides that his stock in the Newport & Alexander turnpike road shall be held by his executor, the income to go to his wife during her natural life, and at her death to be equally divided between his five children, William, Daniel, Henry, Mary and Esther. To the same five of his children he gave his two slaves Hanna and Ben. He then goes on to say that "To my son James, I give and bequeath the sum of five dollars, as his share of my estate." "I give, bequeath and devise all the rest, residue and remainder of my real and personal estate to my wife during her natural life, said property to be left in the hands of my executors for her benefit, said executors to dispose of as much of said property as they think proper, and to use the proceeds for the benefit of my wife, as she needs the same, and at her death to be equally divided between my heirs.

Whether the balance of the estate embraced in this last devise, remaining at the death of the testator's widow, passes to his heirs

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as devisees, or as heirs at law is a matter of but little consequence. His six children are his legal heirs, and they take this residue equally, whether they take under the law of descent or under the provisions of the will.

The fact that the testator devised to James five dollars as his share of the estate, does not argue that he no longer recognized him as a child, nor that he did not intend him equally with his other children, to share in such balance as might remain of this special provision made for his wife.

To William, Daniel, Henry, Mary and Esther, the turnpike stock and slaves were given, to James five dollars in money. The residue of his estate was given to his wife for life, with remainder to his heirs, the same person to whom he had therefore made specific devises, one of these persons was James. His action against the executors to recover his portion of this fund should not have been dismissed.

The court should have taken the necessary steps to ascertain what amount of this devise remained in the hands of the executors, and rendered judgment in favor of appellant for one-sixth of such amount. Judgment reversed and cause remanded for further proceedings consistent herewith.

Hodge, for appellant.

R. T. Baker, for appellees.

EDWARD H. COONS, &C., v. GEO. W. COONS, EXOR., &C.

Wills—Executor Demands Payment in Gold—Legal Tender—Aid of Chancellor—Construing Will.

The question as to the right of the executor to demand of the devisees payment in gold has been settled, and he has no right to demand payment in anything else than legal tender.

Same—Usual Payments.

The executor insists that the words "with usual payments" mean such payments as were usual at the time of the death of the testator. The devisees contend that these payments are to be regulated by the sale of land at the date of the bill. Held, That the intention of the devisor will control the decision of the question.

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Same—Time at Which Will Takes Effect.

A will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Same—Interest.

When payments are given upon property, either by will or deed, the ordinary meaning attached to such language would be, that the payments were to bear no interest.

Same—Election Between Devisees.

Where devises are made in the alternative in a will, and it appears that the party to whom the devise is made, must accept the one or the other but not enjoy both, then an election can be made.

Same—Rejection of Will.

The devisee in a will may reject its provisions, but when he does so, his rights under it are gone.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 17, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

George A. Coons, as the executor of the will of Joshua Coons, deceased, and in his own right, filed the present petition in equity asking the aid of the chancellor in construing the will of his father. The devisees are all made defendants and are before the court. The question as to the right of the executor to demand of the devisees payment in gold for the amount that they may have to pay on the land devised to them by their father, has been recently settled by the supreme court, and the executor has no right to demand payment in anything else than the currency of the country, known as legal tender bills, and this, perhaps, would have been the just and equitable settlement of the question as between the devisees, regardless of the decision referred to. The deviser gives to his two sons, Edward and William, a tract of land each, and in the distribution of the estate, Edward is to be charged to him at \$55 per acre, and William's at \$60, and in the language of the will they are to take the land *with the usual payments*. The will was written and executed by the deviser in the year 1854, and he died in February, 1869. The executor insists that the words, with the usual payments, mean that these two devisees

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are to have the land upon such payments as were usually made in the purchase of land, in the vicinity of the devisor's home, at the time of his death. The proof shows that at the date of the execution of the will, in 1854, the usual payments made by the vendees of land were one-third in hand, and the balance in one and two equal annual payments, *and that at the death of the devisor*, land sales were generally made for cash, or one-third down and the balance in one and two years with interest from date. These two devisees say that their payments are to be regulated by the sales of land made at the date of the will. The intention of the devisors will control the decision of this question. By section 16, Revised Statutes, volume 2, page 461, "A will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." This statute does not control the chancellor when endeavoring to ascertain the intention of the testator from the will itself. The devisor, when he executed this will, evidently desired and intended that these two sons, as well as his son Joshua, should have time given them in which to pay what might be owing by them on the land devised. He knew at the time this will was written and at the date of its execution what were the usual payments on land, viz., one-third down and the balance in one and two years without interest. He was not then anticipating the time when land at such prices would be sold for cash, or upon payments with interest from the date of the purchase, if so, there would have been no necessity for giving to these sons the usual payments on land. The thought never entered the mind of this devisor that by the provisions of this will his sons would be required to pay cash for this property, and such a construction would be a violation of his intention. This view of the case is sustained by the devise to his son Joshua. He had given to Edward and William smaller tracts of land than to Joshua, and as Joshua might perhaps have more money to pay than his two brothers he required him to make four annual payments, viz., in one, two, three and four years from the time of his death. When he used the word payments, as applicable to the devise to either of his sons, he did not intend that these payments, whether in one, two, three or four years, or in *usual payments*, should bear interest. When payments are given upon property either by will or deed, the ordinary meaning attached to such language would be,

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that the payments were to bear no interest, and if the deviser had intended otherwise there could have been found the word interest as well as that of payment, in the will. At the time of the execution of this will there was no such intention on the part of the deviser, as would require his sons to pay the cash for this land at his death, or interest upon the payments. The devisees must either accept the provisions of the will in their favor, or reject the deviser's bounty. The doctrine of election can not apply to a case like this. These devisees have no right in this property except such as are acquired by the will. The will itself gives to the devisees no right of choice as between the land, and its value in money. There is no legal or equitable right to this property vested in the devisees, independently of the will. The deviser doubtless, by placing a valuation on this land, did so, for the purpose of equalizing his children in the distribution of his estate, and for the purpose of preventing any trouble between his children upon that question after his death. It may be that the land is less valuable than the price fixed upon by the deviser, but this was his property he was devising. His children were the objects of his bounty, and in determining the interest they should each have in his estate he saw proper to charge the devisees a fixed price for this land, and the chancellor has no power to alter this provision of his will by giving other property in lieu of it. There are no inconsistent rights in this will as far as it applies to the appellants. Where devises are made in the alternative in a will, and it appears that the party to whom the devise is made, must accept the one or the other, but not enjoy both, then an election can be made, or in cases where the devisee has some right independent of the will, but in this case to permit the election would be in effect determining that in no case is a devisee competent to accept the provisions of a will, but may reject such provisions, and still claim under the will, and obtain the value of the specific devise on other property than that devised. The parties may reject the provisions of this will, but when they do so, their rights under it are gone. Story's Equity, volume 2, page 335, upon this subject says: "Election in the case of will is the obligation imposed upon a party to choose between two inconsistent or alienative rights or claims, in case there is a clear intention of the testator that he should enjoy both * * * of election * * * a plurality of gifts or rights with an intention express or implied of the party who has the right to control one or both, that one should be a

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substitute for the other. The party who is to take, has a choice but can not enjoy the benefits of both." This rule has no application to the present case and no right of election exists with the appellants. The court below should render no additional judgment against these parties who are indebted for the land, until it is made to appear how much they will have to pay to the other devisees by reference to the master.

The judgment of the court below is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Darnaby, Kinkead & Buckner, for appellants.

Breckinridge & Buckner, Buford, J. D. Hunt, for appellees.

THOS. HUNTER v. JNO. W. VEAL AND W. H. DARNABY.

Wills—Construction—Intention—Dying Without Issue.

"I give and bequeath to my son, Thomas Hunter, under the reserves contained in this will, and after the death of my beloved wife, the plantation whereon I now live, at the death of his said mother, to him and his heirs forever. It is also my will and desire that if either of my children die without lawfully begotten heirs of their own body, that then in that case, that part of my estate devised to them to be divided between the surviving children and their heirs forever." Held, That the will vested in the appellant an indefeasible title to the land.

APPEAL FROM FAYETTE CIRCUIT COURT.

January 18, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

The principal object of this suit in equity seems to have been to obtain the judicial construction of certain provisions of the will of George Hunter, deceased.

The testator died in 1804, having made and published his will shortly before. Among other provisions, made in the will for Rachel Hunter, the widow of the testator, he devised to her an estate for life in a tract of land, in the first clause of the will, which is in the following language: "I leave unto my beloved wife, Rachel Hunter, the tract of land and plantation whereon I live during her natural life." After making several specific devises,

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he disposed of the title to the land in remainder, as follows: "I give and bequeath to my son, Thomas Hunter, under the reserves contained in this will, and after the death of my beloved wife, the plantation whereon I now live, and tract of land and all the rest of my estate at the death of his said mother, Rachel Hunter, after paying off all the legacies devised in this will, to him and his heirs forever. And after charging said Thomas Hunter with the payment of a horse to each of two grandsons of the testator, he proceeded further to declare and provide in the will as follows:

"It is the true intent and meaning of these writings that my children, which are not married at this time, live with my wife and be supported off of my property *lent* my wife in the same manner as if I was living until they marry, as is otherwise provided for, and then received the legacies devised to them in this will, when they marry, after which to have no further claim to any support off of the farm and property *lent* my beloved wife and devised to my son, Thomas Hunter. It is also my will and desire that if either of my children die without lawful begotten heirs of their own body, that then and in that case, that part of my estate devised to them to be equally divided between the surviving children and their heirs forever."

Rachel Hunter, the tenant of the land for life, continued to occupy it till her death, which occurred in 1836, at which time Thomas Hunter took possession of it, and he has ever since been in possession of it.

It appears that he has never married, and is now near 80 years old.

In 1870, Thomas Hunter, claiming to have the absolute title to the land, under George Hunter's will, entered into a contract with the appellees, Veal and Darnaby, stipulating for the sale and conveyance to them, of 176 acres of the land; and they, afterwards, questioning his title, refused to accept his deed, and brought this suit for a construction of the will and a rescission of the contract, if the court shall decide that Thomas Hunter took under the will only an estate for life as a determinable fee in the land.

The court below held that Thomas Hunter's interest in the land, under the will, was "a fee, defeasible upon his dying without issue living, at his death," and, therefore, rendered a judgment cancelling the contract, and said Hunter prosecutes this appeal for a reversal of that judgment.

It is contended for the appellant, here, as it was in the lower

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court, that by the devise over, in the event of either of this testator's children dying without issue, he did not mean an indefinite failure of issue, but only intended to provide, that if any of his children should die before the death of his wife, which was the ultimate time contemplated for paying the specific personal bequests, and when the devise of the land to the appellant should take effect, then the devise over should be effectual, but not otherwise. Although, by the general rule for construing the expression dying without issue, it would seem to contemplate the non-existence of living issue at the death of the devisee, yet, as this construction would, if rigidly adhered to, tend often to defeat the intention of the testator, courts of equity have cheerfully adopted the more restricted interpretation, contended for in behalf of the appellant in this case, whenever it is reasonable or fairly deducible from the will itself, that such was the meaning of the testator (*Moore's Trustees vs. Haines' Heirs*, 4 Monroe 199; *Berry vs. Richardson, &c.*, 5 Dana 424).

In this case the devise over, in the contingency mentioned, applies to the various legacies payable in perishable personal property as well as to the land, and it is scarcely reasonable to suppose that the testator intended to direct or control the ultimate disposition of his personal property, after it should pass under the will into the possession of the legatees; and the will furnishes no evidence that he intended the devise over to have one construction as affecting the title to the land and another in regard to personal property.

Our conclusion is that the will of George Hunter vested in the appellant an indefeasible title to the land, and the judgment is, therefore, deemed erroneous.

Wherefore, the judgment is reversed and the cause remanded with directions to dismiss the petition.

Huston & Mulligan, for appellant.

Buford, Kinkead & Darnall, for appellees.

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S. A. HAGARTY, &C., v. S. S. SCOTT.

Judicial Sales—Purchase by One for Another a Trust Results.

When a party purchases land at a judicial sale with the understanding that he is to hold it for another, he holds the land in trust for the benefit of the other.

APPEAL FROM BOONE CIRCUIT COURT.

January 20, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

It is clearly shown by the evidence that at the sale of the property by Calvert, Graves purchased under an agreement between him and Scott that he was to buy the property and hold for Scott, and if he should need the money he had paid out, by an arrangement made by Scott with Calvert he was to refund the money to Graves, and that he did, so that the land, or property was redeemed months before the year expired, even if Graves' purchase could have the effect to invest him with an inchoate title.

As to the sale under the execution in favor of Brown and wife, Corbin bought in the property to secure the debt with the intention to hold the same for Scott, having secured the debt of Brown and wife, and when Dulaney acquired the benefit of his purchase it was with the distinct understanding that Scott was to have the right to redeem, and Dulaney held in it the character of a trust, and when his money was paid the property was to go to Scott, and Hagarty, when he purchased from Dulaney, was well apprised of the whole arrangement and was not a purchaser without notice of the trust.

As the judgment provides for the payment of the several debts of Scott on equitable principles, we perceive no error, and the judgment is *affirmed*.

The CHIEF JUSTICE did not sit in this case.

Drane, for appellants.

O'Hara, for appellee.

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COMMONWEALTH AND MILLSPAUGH'S EXOR. v. W. B. TIPTON.

Attorney and Client—Assignment of Execution by Attorney Without Authority—On Collection Sheriff Should Pay to Original Owner of Execution.

Where an attorney transfers his client's execution without authority, the sheriff who collects same is liable to the original owner for the amount.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

January 20, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

This was an action against the appellee as sheriff of Montgomery county, for failing to pay over to the plaintiff, or his attorney for him, the amount of a debt, collected by the defendant, on an execution in favor of the plaintiff, R. M. Hathaway, as executor of Levi Y. Millspaugh, deceased, against J. H. Graves, which, as the plaintiffs in their petition alleged, was without right, paid by the defendant to L. D. Wilson, who "pretended to own said execution by sale and transfer, made on it by one J. M. Crawford, attorney for Millspaugh's executor;" said sale and transfer having been made without the knowledge, consent or authority of the plaintiff.

The court below having dismissed the petition, on demurrer, the plaintiffs have appealed to this court.

Regarding, as we must, the allegation as true, that the defendant, without the knowledge of the plaintiff, paid the money to Wilson, who claimed it as a purchaser and assignee of the attorney, Crawford, the only essential question to be determined is, whether the sale and transfer of the debt by the plaintiff's attorney, though wrongfully made, were sufficient to authorize the sheriff to pay the money to Wilson.

We think the proper scope and extent of the duty and authority of an attorney at law are ordinarily limited to the institution of suits and their prosecution or defense, and such acts, in and out of court, pertaining thereto, including the receipt of money for the client, as the latter might do himself in order to obtain or

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protect his rights by means of his suit or defense; but the employment of attorney does not imply an agency to sell and transfer the client's claims or authority to convert them to the attorney's own use (Smith's Heirs vs. Dixon, &c., 3 Metcalf 438).

It results that, in our opinion, the petition disclosed a good cause of action, and the court erred in sustaining the demurrer.

Wherefore, the judgment is reversed, and the cause remanded with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

Apperson & Reid, for appellants.

Tenney & Summers, for appellee.

MILTON IRVIE v. URIAH LASWELL.

Landlord and Tenant—Voluntary Abandonment of Premises—Improvements.

Where a tenant voluntarily abandons the leased premises he can not recover from the landlord the value of the improvements placed on the land for his own convenience.

APPEAL FROM BULLITT CIRCUIT COURT.

January 31, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

Appellant had a right to retain possession of the land till the end of 1870; he built the smoke-house and stable for his own convenience, no express contract to pay for them by appellee was proved, and no fact from which such a contract to pay for them can be implied.

Appellant could not have been turned out by legal process, but might have held the premises to the end of the term in spite of appellee, and if he abandoned the possession at the request, or command, of appellee, it can be regarded in no other light than as a voluntary abandonment, and the law imposed no obligation on appellee to pay for the improvements. *Gudgell vs. Duvall*, 4 J. J. Mar. 229.

Scott proved the rent was settled for the year 1868. No errors

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are perceived in the rulings of the court prejudicial to appellant by the court below, and the judgment must be *awrmed*.

W. Wilson, for appellant.

A. H. Field, for appellee.

D. BEATTY & WIFE v. A. A. CURTIS.

Husband and Wife—Wife's Note Not Obligatory.

Arthusa Beatty was, at the time she executed the note, the wife of Decatur Beatty, and by reason of her disability the writing was not obligatory on her.

APPEAL FROM ESTILL CIRCUIT COURT.

January 22, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

It appears from the amended petition that Arthusa Beatty was at the time she executed the note, and still is, the wife of Decatur Beatty, and by reason of her disability the writing was not obligatory on her, and as to Decatur Beatty it is not alleged that he executed the note, or was in any way bound for the debt, and no cause of action is shown to exist against him. And the mere agreement of Oldham did not authorize a judgment against Beatty and wife.

Wherefore, as to Beatty and wife, the judgment is reversed, and the cause remanded, with directions to dismiss the action as to them.

Riddle & Fluty, for appellants.

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JEFFERSON HAMPSON v. COVINGTON & LEXINGTON RAILROAD Co.**Descent and Distribution—Ancestor's Debts—Interest—Absolute Title.**

By the statute in force at the death of the ancestor, his heirs took the absolute title to the land, subject to be charged with the debts, but were not liable for interest.

APPEAL FROM KENTON CIRCUIT COURT.

January 23, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

This suit was brought against appellants as heirs of J. Hampson, deceased, and Withers, as his personal representative, to enforce the collection of the subscription of the decedent of 10 shares of \$50 each to the capital stock of appellee, charged to have been made in 1849.

The amount claimed in the petition is \$500, which was all that was claimed in the account made out and verified under the statute and presented to the administrator for payment, and a judgment was rendered against him for that amount only.

Subsequently an attachment was sued out against appellant and levied on a house and lot in Covington, which, as is alleged, descended to them from their ancestor, the said J. Hampson, the ground for attachment is the alleged non-residence of appellants.

The attachment was sustained, and judgment rendered against appellants for \$1,097.85, with interest from the 14th day of January, 1871, till paid, and costs, and the house and lot adjudged to be sold to pay the same, and of that judgment appellants complain.

Appellants at the death of their father were infants. He died, as the proof shows, before the Revised Statutes went into effect. And there has been no alienation of the estate.

By the statute in force at the death of the ancestor, his heirs took absolute title to the land subject to be charged with the debts, the creditors, however, having no lien on it, and they were only liable for its value, but were not liable for the profits, and of course was not chargeable with interest.

The Revised Statutes have changed the law so far as to make the

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heir or devisee liable for the value of the estate devised or descended, but for interest where he has alienated the estate, but whether in case where there has been no alienation he would be liable for interest is not expressly declared by the statute, and not adjudicated. But be that as it may, under the law in existence at the death of the testator the appellants were not liable for interest, even if the pleadings in this case had authorized such a judgment. *Chambers & Wife vs. Davis*, 17 B. M. 526.

In the first amended petition on which the attachment was issued, there is not only no cause of action stated against appellants, but the affidavit thereto is wholly insufficient to authorize an attachment. And no facts sufficient to constitute a cause of action against appellants were stated until the 29th of March, 1862, when the third amended petition was filed and the affidavit to that was insufficient.

The judgment must, for the reasons stated, be reversed, and the cause remanded, with directions to discharge the attachment, and to render judgment for appellee for \$500, with interest from the date thereof, to be levied of assets descended. Appellants will be entitled to costs on the attachment in the court below.

Carlisle, for appellants.

Stevenson, Myers, for appellee.

S. C. BREASHEAR v. RICHARD BREASHEAR.**Pleadings—Petition—Answer Not Sufficient.**

The petition charges, in express terms, a joint borrowing and indebtedness on the part of appellant and Phillips. The answer of appellant is evasive; a denial that he borrowed the money, or that it was loaned at his special instance and request is not sufficient.

Appeals and Error—Bill of Exceptions—Statement of Clerk Not Sufficient.

A mere statement of the clerk that the paper copied in the record is the amendment offered and rejected by the court is not sufficient to identify it. It should have been incorporated in a bill of exceptions.

APPEAL FROM LARUE CIRCUIT COURT.

January 24, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PETERS:

The petition, in this case, charges, in express terms, a joint borrowing and indebtedness on the part of appellant, and Phillips.

The answer of appellant is specious, and evasive; a denial that *he* borrowed the money, or that it was loaned at *his* special instance and request, is not a sufficient denial of the allegations of the petition, and the court below might well have instructed the jury peremptorily to have found for the plaintiff, notwithstanding the answer.

The mere statement of the clerk that the paper copied in the record is the amendment offered by appellant, and rejected by the court, as has been repeatedly held by this court, does not sufficiently identify it, and this court is not assured thereby that it is the same paper. It should have been incorporated by a bill of exceptions, and made a part of the record by an order of court. As, therefore, the facts alleged were not traversed by the answer, the judgment is right on the pleadings, and the same must be *affirmed*.

Thurman, for appellant.

Chelf, Read & Twyman, for appellee.

GEORGE BEAGLE v. ANDREW BRADLE, &C.

Fraudulent Conveyances—Limitation of Action.

Appellee was the owner of a tract of land in Harrison county in his own right. He exchanged this land for other land, and caused a deed to be made to his wife at a time when he was insolvent and after the creation of appellant's debt. The deed to Mrs. Bradley was recorded in the Harrison county court more than five years before the institution of this suit. Held, That the appellant knew of the existence of this fraud more than five years before he brought his suit, and the statute of limitation relied on by appellee is a bar to his recovery.

APPEAL FROM HARRISON CIRCUIT COURT.

January 25, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

The appellant, George Beagle, obtained judgments at law, on several notes against Andrew Bradley, upon which executions were issued and placed in the hands of the sheriff, and by him returned "no property found." He then filed the present suit in equity against the appellees, Andrew Bradley and his wife, Angeline Bradley, in which he alleges that Bradley was the owner of a tract of land in Harrison county in his own right, and that he exchanged this land with a man by the name of January for his (January's) land, and caused a deed to be made by the latter to his (Bradley's) wife, for the purpose of defrauding his creditors, etc.; that Bradley was at the time insolvent, and the conveyance made to his wife long after the creation of appellant's several debts. The appellees filed an answer, in which they say that the deed to Mrs. Bradley was recorded in the Harrison county clerk's office, and that the only consideration for its execution to the wife by January was the conveyance of this tract of land owned by the husband. They also allege that the making of the deed, and the consideration therefor, were all facts within the knowledge of the appellant more than five years previous to the institution of his suit. The deed to Mrs. Bradley was recorded in the year 1859, and the proof shows that the appellant knew all about its execution and the consideration therefor, and was, shortly after its date, threatening to have it cancelled and subjected to the payments of his debts.

The appellant insists, however, that the conveyance to the wife was voluntary and, therefore, void, and that the statute of limitations is no bar to the action, as the void conveyance vested the wife with no title, and left the equitable right thereto in the husband. We are not prepared to agree with counsel for the appellant in saying that the five-year statute is not an available defense in such a case, and, without determining this question, we can not perceive how this case is embraced by the statute declaring voluntary conveyances void. There was no conveyance in this case by the husband to the wife, although the facts show that the sole consideration for the conveyance made to the wife was the land conveyed by the husband to January. In the case of *Doyle vs. Sleeper*, 1 Dana 572, this court decided that the statutes against fraudulent conveyances was intended to operate only in cases where the debtor himself had made the conveyance, and not where the debtor had

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purchased the property and caused the conveyance to be made to a third person. It was held, however, in that case that conveyances made in fraud of prior creditors were void at common law. In the present case, the husband was insolvent; the conveyance was made to the wife at the instance of the husband, and for land that the husband had purchased with his own means; the debts of the appellant were in existence at the time the conveyance was made, and it was a fraud upon his rights. The 21st section of chapter 80, 1st volume, Revised Statutes, also makes such a conveyance fraudulent as to existing debts. The 20th section of this statute reads: "*When a deed shall be made to one person, and the consideration thereof paid by another, no use or trust shall result to the latter.*" And the 21st section provides "*that such deed shall be deemed fraudulent as against the existing debts and liabilities of the person paying the consideration.*" The consideration in this case was all paid by the husband, and the case, as proven, is not only fraudulent at common law, but made so by the statute referred to. The appellant knew of the existence of this fraud more than five years before he brought this suit, and the statute of limitations relied on by the appellees is a bar to his recovery.

The judgment of the court below is affirmed.

A. H. Ward, for appellant.

J. S. Boyd, for appellees.

JOHN L. BEYSON v. EDWARD ELLS.

Trial—Transfer from Common Law to Equity Docket—Chancellor Takes Place of Jury.

Where a cause is transferred from the common law to the equity docket, the party making the motion must be held to have consented that the chancellor shall take the place of a jury.

APPEAL FROM GREENUP CIRCUIT COURT.

January 25, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

This action was transferred to the equity side of the docket

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upon the motion of appellant, in order that the contract sued on might be reformed and an alleged mistake corrected.

The answer does not sufficiently charge that there was a mistake in reducing the contract to writing.

The nature of the transaction is almost conclusive evidence that there was no such mistake.

It was error to transfer this cause to equity and thereby deprive the appellee of a trial by a jury. As this error was the result of the appellant's motion he must be held to have consented that the chancellor should take the place of a jury. The preponderance of the testimony is not against his judgment, and we, therefore, do not feel authorized to set it aside. Judgment affirmed.

Roe, Phister, for appellant.

Ireland, for appellee.

JAMES BALES v. JOHN PETERS.

Execution—Levy on Personal Property—Negligence in Leaving Property in Hands of Defendant.

If a sheriff permits the defendant to retain personal property on which an execution has been levied and the same is thereby lost, he is responsible to plaintiff for the value of the property.

APPEAL FROM OWSLEY CIRCUIT COURT.

January 26, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

It is not directly charged that Bales was the surety of Wilson in the debt due to Powell. There is, however, some proof conducing to show that he was, and it is evident that both parties conducted the action upon that hypothesis.

It was the duty of the sheriff, Peters, to sell the personalty levied on by him. He had the right, and it was his duty to sell, with or without, a writ of venditioni exponas. *Colgen vs. Haggins*, 1 Duvall 6; *Savings Inst. vs. Chinn's Admr.*, 7 Bush 542. If he permitted Wilson to retain the property, and sell or otherwise dispose of it, and by reason of such neglect of duty, Bales was com-

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pelled to pay the judgment, he is certainly damaged to the extent of the value of the property levied on.

It was erroneous to instruct the jury to find for appellee. The question of fact, upon which appellant's right to recover depends, ought to have been submitted to the jury.

Judgment reversed, and cause remanded for a new trial upon principles consistent with this opinion.

Lilly, for appellant.

Dishman, for appellee.

J. C. CASKEY v. H. J. SPRADLIN.

Forcible Entry and Detainer—Finding of the Jury Not Sustained by Proof—Actual Possession.

None but those who are in actual possession when a forcible entry is made, can maintain the warrant of forcible entry under the statutes.

APPEAL FROM MORGAN CIRCUIT COURT.

January 27, 1872.

OPINION OF THE COURT BY JUDGE HARDIN:

This was a proceeding, by a writ of forcible entry, to recover the possession of a coal bank and land adjacent thereto, claimed by the plaintiff, Henry J. Spradlin, under a patent from the Commonwealth to John Dyer, a decretal sale and conveyance to John W. Hazelrigg of the patent boundary, made in certain suits against Hazelrigg to Spradlin. The inquisition in the country was for the defendant, which being traversed, was found by a jury and adjudged in the circuit court to be untrue; and the traversee, Caskey, has appealed from the judgment to this court.

The only essential question involved on the trial, and which is now before this court for decision is, whether, at the time of the alleged entry by the defendant, the plaintiff had, in fact, the possession of the premises in controversy, and was ousted thereof by the defendant. The testimony of George W. Chappell, as given on the trial, seems to fully show the nature and extent of the asserted possession of the appellee, and the ouster complained of

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by him; that witness stated: "That he was a coal miner; that he was employed by the plaintiff to raise coal on the land in controversy, some time in December, 1870. That he went to work, and was there in the coal bank several days when the defendant, Caskey, came to him and told him to quit work, and claimed the coal bank and land. The witness quit work, as requested by defendant, and went to West Liberty and informed the plaintiff what he had done. The plaintiff sent him back to the coal bank and he remained a few days, when two men came on the hillside near the coal bank, and told him to leave, which he did. He was at the coal bank, in all, about 18 days, and raised about 1,000 bushels of coal. The two men spoken of were unknown to witness. That plaintiff Spradlin lived in West Liberty, 5 miles from the coal bank, and now lives there, and never had possession of the coal bank, to his knowledge, further than by putting him in to work."

Caskey, who claimed the land under title papers, appearing to embrace the land, proved by several witnesses, that for the purposes of using and operating the coal bank, excavating, removing and selling coal, he was in the actual possession of the premises, both before and after the interference by Chappell, and had the coal opened and being worked at another place than that at which Chappell was at work.

Of the action of the court in giving and refusing instructions, so far as copied in the record (some rejected instructions being lost), it is sufficient to say, that no available error appears to have been committed.

But the essential inquiry is, whether a new trial ought not to have been granted on the ground that the finding of the jury was not sustained by the evidence.

It does not appear whether Chappell was driven off from the coal bank by the procurement of Caskey or not, but presuming he was, as we are satisfied his entry on the premises was a mere trespass on the coal bank, then in the actual possession of Caskey, without successfully ousting the latter, and resulted in no more than an attempt to take and hold the coal bank for Spradlin, which was abandoned; and as none but those who are in actual possession when a forcible entry is made, if committed at all, can maintain the warrant of forcible entry under the statute, we are of the opinion that the verdict of the jury was not sustained by the evidence, and ought, therefore, to have been set aside, on the motion for a new trial.

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Wherefore, the judgment is reversed, and the cause remanded for a new trial and further proceedings not inconsistent with this opinion.

Cooper & Havens, for appellant.

Hazelrigg, for appellee.

SAMUEL DINKLESPEIL v. JOHN C. SANDERS, EXOR.

Pleading—Answer and Cross-Petition—Sufficiency of.

It is not alleged, in the answer and cross-petition of appellant, that the choses in action claimed to have been delivered to Sanders, were against solvent persons, nor that anything could have been collected by the exercise of diligence. Held, Such being the case, no judgment could have been rendered on the cross-petition, and the proof fails to cure the defect in the pleading.

APPEAL FROM TAYLOR CIRCUIT COURT.

January 27, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

It is not alleged in the answer and cross-petition of appellant, that the choses in action, claimed to have been delivered by the assignee Parrott to Sanders, were against solvent persons, nor that anything could have been collected on them by the exercise of the most extraordinary diligence. Nor is it alleged that any amount whatever was collected by Sanders. No discovery is asked for, and no claim for damages against Sanders on account of anything done, or anything he failed to do touching such choses in action, is set up. Such being the case, no judgment could have been rendered on this cross-petition. The proof in the case does not tend to cure the defects of this pleading. The court did not err in failing to refer the matter to the master. Appellant did not ask for such reference, and did not object to the submission of the cause when it was heard.

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Under the pleadings and proof, the circuit judge could not avoid dismissing the cross-petition.

Judgment affirmed.

Caldwell & Sachs, for appellant.

J. R. Robinson, for appellee.

JOHN ARMSTRONG v. T. W. HUDGENS.

Judgments—Actions to Enforce Collection—Second Judgment in Personam.

In an action to enforce the collection of a judgment, the circuit court has no authority to render a second judgment in personam.

APPEAL FROM CARTER CIRCUIT COURT.

January 27, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

This action was instituted to enforce the collection of a judgment. The circuit court, therefore, had no authority to render a second judgment *in personam* against the appellant, and to this extent the judgment appealed from must be reversed.

There is a slight error in the amount adjudged to be paid out of the Jacobs debt, but the error is so insignificant (being less than one dollar), that the judgment *in rem* will not be disturbed on that account.

The formal judgment is reversed and cause remanded.

Davis, for appellant.

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JOHN CLAY & OTHERS v. THE CARLISLE & JACKSTOWN TURNPIKE R. COMPANY.**Counties—Subscription to Capital Stock in Turnpike Company.**

By an act of the General Assembly, the judge of Nicholas county was empowered to make subscription to the capital stock of turnpike companies, "provided that such subscription shall not be made until said court shall be satisfied that an amount of capital stock sufficient to complete each mile of road to which such county subscription applies has been taken by private subscription. Held, That the language of the statute is clear, explicit and non-mistakable. It is an indispensable prerequisite that the court shall be satisfied, that the amount of stock sufficient with the aid of the county subscription to complete each mile to which such county subscription applies, has been taken by private subscription, before such subscription is valid.

APPEAL FROM NICHOLAS CIRCUIT COURT.

January 29, 1872.

OPINION OF THE COURT BY JUDGE LINDSAY:

By an act of the General Assembly, approved February 9th, 1864, as amended February 9th, 1866, the presiding judge of Nicholas county was empowered to make subscription to the capital stock of any turnpike road company, incorporated in and for said county, not exceeding the sum of one thousand dollars, for each mile of such roads, located within its limits; "provided that such subscriptions shall not be made until said court shall be satisfied that an amount of stock sufficient, with the aid of such county subscription, to complete each mile of road to which such county subscriptions apply, has been taken by private subscriptions." In the case of Clay & Others vs. Nicholas County Court, &c., 4 Bush, 154, it was held that unless it was made to appear to the satisfaction of the county court that private subscriptions to an amount sufficient with the county subscriptions to complete each mile of road to which the same applied had been taken, said court had no power to subscribe for stock to any amount, and that a subscription made before such condition precedent had been complied with was unauthorized and void.

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From the petition filed in the Nicholas county court by the Carlisle & Jackstown Turnpike Road Company (upper route), asking a subscription by said county to the capital stock of said company to the amount of three thousand dollars, it appears that this road is something over six miles in length, and that a little over three miles thereof have already been expended in the completion of the same, and that the company is indebted in about the amount asked to be subscribed by said county, and they ask said subscription to enable them to pay off this indebtedness.

The appellants, Clay & Others, citizens and tax payers of Nicholas county, upon their own motion and without objection, were made parties to the proceeding in the county court. They resisted the application for the subscription, but their objections were disregarded, and the subscription for stock made, as asked for. The order of the court stating in its face, that the county court subscribed for the county of Nicholas one thousand dollars for each mile of the three miles of the road already completed.

From this order an appeal was prosecuted to the circuit court, and that tribunal having affirmed the action of the county court, the proceeding is now before us upon an appeal from this last decision. It is not pretended that the three thousand dollars subscribed by the county, will complete the entire road, nor indeed that it will enable the company to do more than pay off the indebtedness incurred in constructing the three miles already completed, and the company in their petition clearly indicate their intention to apply the amount asked to be subscribed to the payment of the same, in order, as they say, to restore public confidence and induce further subscriptions by private individuals. It is insisted, with earnestness and with some degree of plausibility, that the two acts of the General Assembly, under which the county court claims to have acted, do not authorize and were not intended to authorize county subscriptions for stock in any company that had not already secured an amount by private subscriptions, which, with the aid given by the county, would assure the completion of each and every mile of road located within its limits. We are of opinion that in disposing of this appeal, we need not decide this question, as the subscription by the county court was unauthorized for other, and, we think, all sufficient reasons. The Legislature certainly did not authorize the county of Nicholas to become a stockholder in the various turnpike road companies within its limits on account of the intrinsic value of the stock, not because it was

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believed, or hoped, that such investments would be profitable to the county in a financial point of view. Nor could it have been contemplated that the people of said county were to be taxed in order to enable turnpike companies to pay off indebtedness incurred in the construction of roads already completed. It must be apparent to every one that the end sought to be attained by these enactments, was to secure the construction of additional miles of such road in order that the convenience of the people might be subserved, and the general prosperity of the county advanced. The subscription complained of is neither calculated nor expected to accomplish either of these objects.

By its own terms, it is confined to three miles of road already constructed, and when it shall have been paid to the company and devoted to the payment of its debts, there will not have been a single additional mile of turnpike road constructed in Nicholas county.

Whether or not the payment of these debts will have the effect of encouraging additional subscriptions by private individuals, must, of necessity, be a matter of mere conjecture or speculation. But if it would do so, beyond even a rational doubt, it could not authorize the subscription. The language of the statute is clear, explicit and non-mistakable. It is an indispensable prerequisite that the court shall be satisfied that an amount of stock, sufficient, with the aid of the county subscription, "*to complete each mile to which such county subscriptions apply,*" has been taken by private subscriptions.

Accepting the language of the order of the county court as indicating its intention to apply its subscription to the three miles of road already completed, and it is unauthorized, because it does not come within either the spirit or letter of the legislative enactments, or it does not secure, nor even have a direct and certain tendency to secure the construction of these additional miles of road. Upon the other hand, if it be admitted that the company will not be bound by this limitation, but will have the right to apply the county subscription to the completion of their road, then the action of the county court was not authorized.

The record not only fails to show that there are unexpended private subscriptions, sufficient with the aid to be given by the county, to complete three additional miles of road, but exhibits the fact that such subscriptions have been exhausted, and the company still largely indebted.

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It is not necessary that we should express an opinion as to whether or not the good faith of the tax-payers of Nicholas county requires a subscription to the company of an amount sufficient to pay the debts due to contractors who worked upon the faith of the original subscription. They are not legally bound to pay these debts, and without further legislation, the county court can not compel them to discharge a purely moral obligation. This is not an effort to cure a defective subscription of stock. The first subscription was absolutely void, not merely defective. The money collected from the tax-payers under the void subscription still belongs to them. They have the right to compel the sheriff to refund it. The county court has no claim upon it, and no right to control it. Hence, this is not a proceeding to compel the sheriff to pay over money held by him for the benefit of Nicholas county. These conclusions make it not necessary to decide the other questions presented.

The judgment of the circuit court is reversed, and the cause remanded with directions to that court, to reverse the judgment of the county court, and for such other proper proceedings as may be necessary.

Andrews & Ross, Craddock & T., for appellants.
Phister, for appellees.

HARRISON JOYCE, &C., v. F. MONK.**Vendor and Purchaser—Married Woman's Power of Attorney.**

John Myers' title to the land was perfect and complete, as the record shows, and the only question presented is, Did Mrs. Joyce, the mother of appellees, divest herself of her title to her undivided interest in this land previous to her death. The power of attorney signed by her was never acknowledged or recorded. Held, That as the power of attorney signed by her was never acknowledged or recorded, she was incapacitated by reason of her coverture from making any sale or conveyance of her land.

Same—Divorce—Acquiescence—Estoppel.

The grounds of defense is, that Mrs. Joyce, after the divorce from her husband, by mere acquiescence upon her part in permitting the purchaser to take possession of this land was estopped from asserting claim to the property. Held, That mere acquiescence on the part of one having

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title to land is insufficient to divest the owner of his rights to it.

Disability—Statute of Limitation.

A continued adverse holding for fifteen years against the party claiming, when not laboring under any disability, will bar recovery in an action for real estate.

APPEAL FROM BULLITT CIRCUIT COURT.

January 30, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

John Myers, in his lifetime, was the owner of a large boundary of land, in the county of Bullitt, and had at various times given to each one of his children (having five in number) a tract of land located within the metes and bounds of this large tract, and had perhaps sold off portions of it to others.

After his death, his children ascertaining that some of the land within this boundary had been undisposed of by their father, in order to sell it, executed a power of attorney to one Henry Myers, dated in the year 1847, empowering him to sell, and dispose of these lands for them, to such persons, and for such prices, as he thought proper.

Lydia Joyce was a daughter of John Myers, and at the time she executed this power of attorney, was a married woman, her husband, Richard Joyce, being then alive, and uniting with her in the execution of this power.

Mrs. Joyce, not long after the date of this power of attorney, was divorced from her husband, and in the year 1858, and after the divorce had taken place, Henry Myers, by virtue of the power of attorney, executed in the year 1847, sold and conveyed a tract of this land to W. N. Stokes, and Stokes sold and conveyed it to the appellee, Monk.

Mrs. Joyce and her husband are both dead, and her children, the present appellants, on the 25th of March, 1870, filed this suit for the recovery of their undivided interest in and to the tract of land in controversy.

John Myers left, at his death, five children; his title to this land was perfect and complete, as the record shows, and the only question presented is, did Mrs. Joyce, the mother of the appel-

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lees, divest herself of her title to her undivided interest in this land previous to her death.

The power of attorney, signed by her, was never acknowledged or recorded, and it must be conceded that she was incapacitated by reason of her coverture, from making any sale or conveyance of her interest in this land, except as provided by the statute.

It is not insisted upon by counsel for appellee that a feme covert could pass her title to land in any other manner. The ground of defense is, that Mrs. Joyce, after the divorce from her husband, by mere acquiescence upon her part in permitting the purchasers to take possession of this land was estopped, as well as her children after her, from asserting any claim to the property.

If mere acquiescence on the part of one having the title to land is sufficient to divest the owner of his right to it, there is but little, if any, necessity of interposing the statute of limitation as a defense to any action for the recovery of property. A continued adverse holding for fifteen years against the party claiming, when not laboring under any disability, will bar a recovery in an action for real estate.

There is no proof of any fraud practiced upon any of the vendees of this land by Mrs. Joyce or the appellants. There is no act of her, after she became discover, by which these parties were induced to buy her interest in this land. The power of attorney, so far as it affected the rights of Mrs. Joyce, was a mere blank, and is to be treated as if she had never signed it. There is nothing in the record conducing to show that she ever ratified the act of Henry Myers in the sale of the land. She had never received any part of the purchase money, and the only semblance of proof on this subject is, that she remarked not long before her death to a man by the name of Todd, that she expected to receive some money from Henry Myers on the land.

Such proof as this is too flimsy to divest one of the title to land, or to authorize the chancellor to conclude that it was a ratification of the power of attorney, dated in 1847, or as evidencing a verbal authority from Mrs. Joyce to Henry Myers to sell this land.

This court, in the case of Blackburn Heirs vs. Pemmyter, — B. Monroe, page 219, decided that when there had been a defective acknowledgment by a feme covert, and that after the death of her husband, she induced a sub-purchaser to pay out his money by stating to him that the title was valid, did not estop her children from recovering the land upon the mother's title.

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In this case, there are no facts upon which to base the question of estoppel, and the statute of limitation is no bar to the action, as the suit was instituted within fifteen years from the date of the sale by Henry Myers to these under whom the appellee claims.

The judgment of the court below is reversed, and cause remanded, with directions to enter a judgment in favor of the appellants for their interests in the land in controversy.

A. H. Fields, for appellants.

J. V. J. McConathy, Thompson, for appellee.

JAMES CAMPBELL ET AL. v. L. M. FLOURNOY, & CO.

Judicial Sale—Purchase Pending Litigation—Notice.

A purchaser of land at decretal sale, pending the litigation, is bound to take notice of all that had been then done, or might thereafter be done in the case.

Same—Covenant of General Warranty.

A covenant of warranty in a commissioner's deed, made in pursuance of a decree, binds the constituents and their heirs as effectually as if made by them in their proper person.

Same—Setting Aside Sale—Return of Purchase Money.

In no event will a decretal sale be set aside by the party procuring it without tendering the purchase money.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

January 30, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

A suit was brought by G. R. H. Clark, alleging that William P. Clark, died in St. Louis, Mo., intestate, without issue, and without personal estate sufficient to pay his debts; that decedent, together with plaintiff, M. L. Clark, and J. K. Clark, children and only heirs of Gen. W. Clark, had inherited lands in McCracken county, and town lots in Paducah, which had been partitioned amongst said persons, the heirs at law of their father. That lot No. 1 had been allotted and set apart to said William P. Clark, deceased,

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with other lands in said county; that decedent at the time of his death, was indebted to plaintiff in the sum of \$316, no part of which had been paid, and he prayed that said "lot No. 1, north of the base line lying on the Ohio river and binding on Island Creek containing ——— acres be sold, or so much as would be required to pay his debt, interest and costs. And his co-heirs M. L. Clark, J. K. Clark, and Samuel Churchill vendee of M. L. Clark were made defendants to said suit. J. K. Clark was alleged to be an infant under 21 years of age, and M. L. Flournoy was appointed guardian *ad litem*, and answered for him. Samuel Churchill answered.

On the 4th of April 1845 a judgment was rendered in the suit adjudging to the plaintiff the sum of \$316, with interest from the 14th of December, 1841, till paid and costs, and that the tract of land mentioned in the bill, and shown by exhibit B and known as number one, north of the base line lying on the Ohio river and binding on Island Creek, containing ——— acres, or so much thereof as might be necessary, be sold to pay said debt.

In June, 1845, Small, the commissioner, appointed to make the sale, sold the land and at the July term, 1845, he reported that he exposed to sale on the 9th of June, 1845, the tract of land mentioned in the decree, and the whole tract being bid up to the amount of the debt, interest and cost. He designated a portion on the lower end of the tract to be laid off by lines running parallel with the upper boundary line of the town of Paducah, from the river to the back line of the tract, and cried the same. And Philip Marouse, and James Campbell, bid, and undertook to pay said debt, interest and cost for 39 acres of the land laid off as above described, the land struck off to them and the sale reported to the court the 9th of July, 1845, when it was approved, and confirmed by the court. At the October term, 1848, Marouse and Campbell produced their written consent and agreement that the 39 acres of land purchased by them as aforesaid, should be conveyed to Henry Glass, and the court thereon ordered said Small, as commissioner, to make the conveyance to Glass. On the 26th of October, 1848, the said commissioner after reciting the decree, sale, and confirmation thereof, conveyed to said Glass, for and on behalf of G. R. H. Clark, M. L. Clark, and Samuel Churchill, his vendee, and J. K. Clark thirty-nine acres of land, being part of "lot No. One," on said

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division, north of the base line, beginning at the lower corner of lot No. 1, on the river and describes the parcel of land by metes, and bounds.

On the 24th of February, 1847, G. R. H. Clark for a valuable consideration as expressed in the deed, conveyed a number of town lots in Paducah, and various tracts of land in McCracken county to L. M. Flournoy, and amongst the tracts of land so conveyed is a tract described as "*Lot No. 2*" north of the base line as laid down on the amended map, and report of said commissioners as filed in the McCracken circuit court, and accepted, and confirmed by said court, containing 201 acres, more or less, lying on the waters of Cross Creek.

On the 22nd of April, 1847, Flournoy, Norton & Jones, Flournoy having conveyed an interest in the lands purchased by him of G. R. H. Clark, to the two latter, filed their petition in the suit of Wm. P. Clark's Administrator vs. His Heirs and Creditors in said court praying that the plaintiff in said suit should be compelled to make them defendants, setting up the conveyance from G. R. H. Clark, and assign as a reason for seeking to be made defendants in that suit, that they may be placed in a condition to assert their claim to the *201 acres in No. 2* according to the report of the commissioners, and that they may except to the report, and plat of the surveyor.

They were made defendants, and no further action seems to have been taken by them until the 8th of November, 1856, when the death of Jones was suggested and a revivor was made in the name of his heirs, and in an amended cross-petition, in which after recapitulating the facts in relation to the various suits to subject the real estate of W. P. Clark, deceased, to the payment of his debts. They state that they were to have 60 acres of land taken from the original division giving the manner it was to be laid off, and after stating that they are the legal, and equitable owners of lot No. 2, they pray the court to decree to them a perfect title to the land, the possession thereof. But little seems to have been done in the case until the 15th of October, 1863, when as the record shows Flournoy and his vendees filed an amended petition in which after, in an extended manner recapitulating the modes in which the Clarks derived title to the land, the various suits growing out of the death of Wm. P. Clark, they state the facts in relation to the suit of G. R. Clark vs. Wm. P. Clark's heirs, &c., and allege that when the deed was

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made to Glass the suit was off the docket, and that said G. R. H. Clark, being out of court, knew nothing about what was done in the case and that the order of the court directing the conveyance to be made to Glass, and the deed made to him in conformity thereto are void, and that the deed included land not decreed to be sold, and which did not belong to the estate of W. P. Clark, that the court have no power to sell said land and that the conveyance to Glass was void, and pray to have it set aside.

On final hearing the prayer of the petitioners was granted, Glass' deed cancelled so far as any of the land included in it was alleged to have been embraced in the amended report of the commissioners and appellants, ordered to pay the costs. No provision was made to refund to Glass, or his vendors, the money paid by them to G. R. H. Clark, nor does it appear that he was before the court on the cross bill of appellees. And from that judgment this appeal is prosecuted.

In the first place Fournoy purchased, pending the litigation, between G. R. H. Clark vs. Wm. P. Clark's heirs, and is therefore bound to take notice of all that had been then done, or might thereafter be done in the case. The judgment for the sale of the land had been rendered and it conformed precisely to the allegations of the petition as to the description of the land. The sale seems to have been made in conformity to the judgment. The vendor of appellees got the price for which the land was sold, was in court when the sale was made, and when it was confirmed, and made no objection to the conveyance. The commissioner, who made the sale and conveyance to Glass, was one of the commissioners who divided the lands amongst Clark's heirs. And it is strange that he did not know it, if he was conveying a part of lot No. 2 to Glass. That conveyance contains a covenant of general warranty against appellee's vendor, G. R. H. Clark. And this court has held that a covenant of warranty in a deed made by a commissioner in pursuance of a decree binds the constituents, their heirs, &c., as effectually as if made by them in their proper persons. *Logan vs. Moore*, 1 Dana, 57.

Nor do appellees occupy any more favorable position than G. R. H. Clark himself, as before remarked. And this case presents parties seeking to set aside a sale and conveyance procured by themselves or their vendor, the proceeds of which he has received

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and applied to his own use, without tendering to the purchaser the money he had paid, or showing that other land can be conveyed in place of that he must be deprived of, and that, too, without his fault, for it is not charged that the deed was made by mistake, nor that there was any fraud in its procurement, nor is it alleged in any of the pleadings that lot No. 2 contains less land than 201 acres, the quantity called for in appellees' deed. These appellees are in no better condition than G. R. H. Clark would occupy if he were asking relief. And if he were not estopped from setting up claim to the land which he had sold and appropriated the proceeds, the chancellor certainly would not hear him complain until he tendered back the money he had thus appropriated and unless he had done so his bill would be dismissed. In any view of this case appellees failed to show that they were entitled to relief and their petition should have been dismissed. Wherefore the judgment is reversed and the cause remanded with directions to dismiss the cross-petition of appellees.

J. Campbell, for appellants.

Williams, for appellees.

MARY F. CORD, &C. v. M. E. REEVES & Co.

Judgment—Action to Set Aside—Want of Process.

Where there is no process served on the wife, the husband has no power to consent to a judgment against her, to subject her property to sale.

APPEAL FROM FLEMING CIRCUIT COURT.

January 31, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

In this case there was no service of process on either of the defendants. The husband had no power to consent to a judgment in personam against the wife and to subject her property to sale under an execution upon such a judgment. Nor has he the power to say that the judgment shall be rendered against the

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firm as such. There is nothing in the record giving him this authority from Miss Dupuy, who is a co-defendant with his wife. The whole proceeding is erroneous. If the confidence of counsel for the appellees has been misplaced or betrayed, it is his own misfortune, and he is without remedy in this court upon the facts presented in the record. The judgment is reversed and cause remanded with directions to the court below to set aside the judgment and award to appellants a new trial and for further proceedings consistent with this opinion.

Cord, Huston, Johnson, for appellants.
Throop, for appellees.

JAS. K. CLAYBROOK v. JAMES JONES.**Process—Proof of Loss—Entry by Clerk.**

In the absence of proof that a summons was lost, the entry by the clerk on his docket, as to the service, is not evidence.

APPEAL FROM WASHINGTON CIRCUIT COURT.

February 1, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

It does not appear from anything in the record that the summons said to have been executed upon the appellant in Washington county was ever lost. In the absence of such proof the entry by the clerk on his docket as to the service is not evidence. The court had no right to render a judgment upon the summons on the defendant out of the county where this suit was instituted. Judgment reversed and cause remanded with directions to set aside the judgment and for further proceedings consistent herewith.

Broune & Lewis, for appellant.
J. S. Ray, for appellee.

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GEO. HERMAN v. CHAS. REIS, by &c.

Evidence—Statement of Wife Not Competent Against Husband.

The wife is not competent to testify against her husband, and her admissions or statements will not be admitted as evidence against him.

APPEAL FROM JEFFERSON CIRCUIT COURT.

February 1, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

For the error of admitting incompetent evidence which was objected to, at the time, and an exception taken to the ruling of the court, the judgment must be reversed.

After appellee had been bitten, his mother, and Miss Kate Reis, his sister, went to the house of appellant and while there appellant's wife made certain statements, or admissions in relation to the dog, which appellee offered to prove by the young lady, and which tended to identify the dog, the evidence was objected to, the objections overruled, and the witness permitted to prove the statements of Mrs. Herman.

The general rule is that neither the husband, nor wife is admissible as a witness in a cause, civil or criminal, in which the other is a party—to this general rule there are certain exceptions, and qualifications, allowed from necessity of the case, but this not one of the exceptional cases. And *a fortiori*, if the wife is not competent to testify against or for her husband—the admissions or statements of the wife will not be admitted as evidence for, or against her husband. 2 *Slarkie on Evidence*, p. 46, 1 *Greenleaf on Evidence*, Sec. 334.

Wherefore, for the error indicated, the judgment must be reversed, and the cause remanded for a new trial, and further proceedings consistent herewith.

F. Maguire, B. Bacon, for appellant.
Jackson & Parsons, for appellees.

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BROWN & WHITTAKER v. E. EPPERSON, &C.

Venue, Change of—Waiver of Objection.

Appellant was in court at the time the order was made changing the venue and did not object, and after the venue was changed, filed an amended petition and had orders made in the case which must be regarded as a waiver of any irregularity in the order changing the venue.

APPEAL FROM HENRY CIRCUIT COURT.

February 5, 1872.

OPINION OF THE COURT BY JUDGE PETERS:

The statute of limitations is pleaded as a bar to appellant's demands, and from the evidence it appears that the appellee, Mrs. Epperson, resided in Shelby county until November, 1864, 'after her marriage with F. Epperson, and then removed from the state. All the items of the account against Mrs. Epperson as presented by Dupey, the witness, are dated prior to November, 1859, except an item for expenses to Louisville, and hunting negroes levied on by Ellis \$25, which is dated 1860 and Mills the witness, who proves that the services were rendered, fixes the time in 1856 or 1857, so that was barred according to the proof before this suit was instituted. Another item in the account is dated March, 1860, but the services are not satisfactorily proved.

Appellant was in court at the time the order was made, changing the venue to the Henry circuit court, and did not except to the action of the court, and after the venue was changed appeared, filed an amended petition, and had orders made in the case which must be regarded as a waiver of any irregularity that may have occurred in the order for the change of the venue in the case.

It seems to the court that waiving the consideration of other questions discussed, the statute of limitations, which is relied on by appellees, is a bar to the recovery.

And the judgment must be *affirmed*.

Scott, for appellants.

Harwood, for appellees.

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WM. A. CRIDER *v.* PETER SMITH, &C.**Bills and Notes—Action Against Assignor—Answer—Demurrer.**

The answer states that the appellant received no consideration for the assignment, but made it at the request of the parties. That Smith knew the land, for which the note was executed, belonged to Crider; that Crider was to perform the covenant in the deed in regard to fence. Held, That the answer is not sufficient because the law implies a liability on the part of the assignor to pay the consideration received by himself or third person, in the event that the note, when assigned, was paid off, or not collectable by reason of an equitable set-off.

APPEAL FROM OLDHAM CIRCUIT COURT.

February 6, 1872.

OPINION OF THE COURT BY JUDGE PRYOR:

The demurrer to the answer of the appellant was properly sustained. The answer states in substance, that the appellant received no consideration for the assignment, but made it at the request of the parties. That Smith knew the land for which the note was executed belonged to Edward Crider, and that the latter owned the note; that he also knew that Edward Crider was to perform the covenant in the deed in regard to the building of the fence. These allegations may all be true and upon the demurrer be so held and still the appellant is liable on his assignment. If, by reason of this assignment, the consideration for the note passed to Edward Crider or to a third person, it renders the assignor as responsible as if he had received the money. The law implies a liability on the part of the assignor to pay the consideration received by himself or a third person in the event the note when assigned was paid off, or any part of it, or when it could not be collected by reason of good or equitable set-offs against it by the obligors. There is no allegation in the answer that W. A. Crider by an agreement between the parties was not to be held liable as assignor. The note was payable to him—he assigns it—the consideration was paid to Edward Crider, and it may be that the appellee required appellant's name in the note before he would part with his money. This could be the

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presumption of law on the facts presented in the answer. The appellant may not have received one dollar himself, but if Edward Crider did, by reason of this assignment, he is liable unless there was an agreement by which he was not to be held as assignor. There is no exception to the reading of the record in the Louisville chancery court. It was made part of the original petition and the allegations in regard to the result of that suit, are not denied in the answer. Smith and wife are both plaintiffs in the court below, and the benefit of the judgment passing to the wife is no cause of complaint on the part of appellant, and besides no exception was made or taken upon this point in the court below. The judgment, however, is for too much. The record of the suit from Jefferson shows that the obligors in the note received a credit for a note of \$100 held on Smith. This amount should have been a credit on the judgment of the date of the note. The judgment of the court below is reversed and cause remanded for further proceedings consistent herewith.

Rodman, DeHaven, for appellant.

Lee & Rodman, Carroll, for appellees.

V. R. BARTLETT & Co. v. T. C. NEWCOMB.

Contracts—Delivery of Personal Property—Possession Passes With Title—Resumption of Possession—Tortious.

The possession was to pass with the title, and that when the tobacco was received and weighed by January & Son, the right of Newcomb to control it ceased. Held, That in such a state of case, the resumption of the possession of tobacco was a tortious seizure by Newcomb, and the value of the same at the time of the seizure constituted the amount of the set-off against the contract price.

Same—Violation of Contract.

In as much as Newcomb was the first to violate the contract, he ought not to be allowed to recover damages against Bartlett & Co., because they afterwards declined to carry it out.

APPEAL FROM JEFFERSON CIRCUIT COURT. C. P. DIVISION.

February 8, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE LINDSAY:

We hold that according to the terms of the contract between Newcomb and Bartlett & Co., the title to the tobacco was to vest in the latter, upon its being delivered to and weighed by January & Son, and that Newcomb had the right to demand the contract price for the same as soon as the bills of lading should be received by the appellants.

We further hold that the possession was to pass with the title, and that when the tobacco was received and weighed by January & Son, the right of Newcomb to control it ceased.

It follows, therefore, that if Newcomb had in point of fact surrendered to January & Son the possession of the last lot of the tobacco, when it was weighed, his right to demand from Bartlett & Co. the contract price therefor when he presented to them the bills of lading would have been perfect, and upon their refusal to pay, he might have instituted suit against them at once. In such a state of case the presumption of the possession of the tobacco, at Cincinnati, would have been a tortious seizure by Newcomb, and the value of the same, at the time of the seizure, would constitute the amount which Bartlett might have set off in this action against the contract price.

But the evidence as presented by the record conduces to show that Newcomb never did surrender to January & Son the thirty-two hogsheads of tobacco shipped on the 26th of September, 1864, and leaves no doubt that he retained the possession of the four hogsheads on the following day. January swears that he shipped the first lot by the directions of Newcomb, who it seems either accompanied it to Cincinnati or had preceded it to that city, and the last lot was consigned to him at that place. It further appears that under some arrangement not explained by the record, Newcomb was enabled, without the aid of legal process, to detain at Cincinnati, for ten or twelve days, the thirty-two hogsheads consigned to Bartlett & Co.

The failure of Newcomb to surrender to January & Co., as agents for appellants, the tobacco in question as he was required by his contract to do, we may assume grew out of the fact that the latter were setting up some claim against him on account of the damage to certain other tobacco thereto received and paid for by them. That Newcomb was detaining the lot shipped on

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the 26th of September for some such reason, is made to appear by the fact that Smith was sent to Louisville with the bills of lading to demand payment of the contract price, and the further fact that when such payment was refused the information was sent to Newcomb, at Cincinnati, by telegram. The result of this failure upon the part of Newcomb to comply with the terms of his contract by surrendering the control of the tobacco to the agents of Bartlett & Co., was to delay its arrival at Louisville for ten or twelve days, during which time its market price was steadily declining.

If these conclusions be correct, it seems to us that inasmuch as Newcomb was the first to violate the contract, he ought not to be allowed to recover damages against Bartlett & Company, because they afterwards declined to carry it out. The more especially as they could not do so without great loss to themselves, which loss was the proximate and necessary result of Newcomb's failure to abandon the possession and control of the produce to January & Son as he had agreed to do. For these reasons we are constrained to reverse the judgment of the court below, and remand the cause for a new trial upon principles not inconsistent with this opinion.

Gazlay, Yeaman, Reinecke, for appellant.

J. P. Harbeson, for appellee.

JEFF. BROWN v. E. J. YOUNG'S ADMX.

Set-off and Counter-Claim—Dismissal of Action—Effect on Set-off.

As appellant had dismissed his action on a note to which appellee had pleaded a set-off, there was then no suit pending between the parties, the appellee could not proceed with the trial as to her set-off.

Bills and Notes—Necessary Parties.

The assignor of a note must be before the court before a judgment can be rendered against the assignee.

APPEAL FROM JEFFERSON CIRCUIT COURT. C. P. DIVISION.

February 8, 1872.

Opinion of the Court.

OPINION OF THE COURT BY JUDGE PRYOR:

The suit by the appellant, Brown, on the note for sixteen hundred dollars against the appellee as administratrix of her husband, was dismissed by the appellant, and the note withdrawn.

There was then no suit pending in court between these parties. The appellee had pleaded a set-off to this note originating from the alleged liability upon the part of appellant's assignor to her intestate. The assignor of the note was not before the court, and no judgment could have been rendered against the appellant, as assignee, upon this set-off other than an amount sufficient to extinguish the note. When this note is no longer in court, and the suit upon which it is heard is dismissed, we cannot well see how the appellee can proceed with the trial as to her set-off without having the party against whom the set-off is plead in court. It cannot be insisted that the set-off affects the note when there is no such note in court and no suit pending to recover it. The court permitted appellant to dismiss his suit, and withdraw the note and this ended all controversy between the parties, and the set-off could not be tried without having the party before the court against whom a judgment might have been rendered upon it. The judgment is reversed and cause remanded with directions to set aside the judgment upon appellee's set-off and for further proceedings not inconsistent with this opinion.

Brown, for appellant.

Barret & Roberts, for appellee.

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cation: "Was there any agreement between your mother and plaintiff, when she consented to send you to school to plaintiff, as to whether he was to whip you or not?" Held, not competent evidence, as it is not stated the alleged promise was made at the time the contract was made to send the daughter to school, or that it constituted any part of the contract.535

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A purchase of a right-of-way for a corporation, held, to be sufficient consideration to uphold a note given by the individual directors of the corporation.372

Stock Subscriptions—How Payable.

Articles of incorporation provided that stock subscribed for and closed up before the first election of directors and officers, could be paid for in any species of property, personal or real. Said payment to be ratified afterwards by the officers of the company. Held, that unless the provisions as to the requisite amount of stock to be subscribed was fully performed, no officers could be elected, and any transfer of real estate for stock would be subject to rescission by the vendor.....355

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R. assessed his land at about \$20.00 per acre. The railroad company took three acres and cut off about fifteen from the main land. Held, that a judgment in damages for \$464.00 is excessive.....446

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In estimating damages for land taken, the defendants are entitled to be paid the value to them of the land taken, notwithstanding any enhancement in the value of those not taken, but the jury should be instructed, that in estimating the value of the land taken, the enhanced value, if any, to the entire tract, should not be allowed to enter into their estimate at all.....445

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A re-investment of a surplus for one of the devisees, through her husband, as trustee, held not improper.363

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A mortgagee can acquire no greater right by his mortgage and foreclosure than the mortgagor had, and a sale under the mortgage will not affect the right of distributees to a recovery out of the land of overplus

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Accounts—Acceptance of Note as Payment—Best Evidence.

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Proof—Action on Joint Note of Husband and Wife.

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After the second husband possessed himself of his wife's money he purchased other land with it and took the deed to himself, and it recited that he paid the consideration, showing that he had appropriated the money and made the purchase to his own account. Held, that after the contract was thus completed and acquiesced in for more than twenty years, parol proof of admission by the husband that he had purchased the land for his wife, and to set up a resulting trust is inadmissible.

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EXECUTORS AND ADMINISTRATORS.**Decedent's Estate—Settlement—Preferred Claims—Loss of Security.**

The decedent had pledged fifty hogsheads of tobacco to secure a debt of \$6000.00. The tobacco was worth a much larger sum than that for which it was pledged, and the executrix being desirous to redeem it, and to ship it to a foreign market, drew a sterling bill of exchange on Gilliott & Co., Consignees, in the city of London, for over \$8,000.00, which she sold to appellant, and with a part of the proceeds redeemed the tobacco. The tobacco was destroyed by fire in transit, and became a total loss to decedent's estate. The bill was protested for non-payment. In the suit to settle decedent's estate the appellant claimed that its debt constituted a part of the necessary expenses of administration. Held, that a debt thus created, and apparently secured, should not be treated as a preferred debt after the loss of the security, to the injury of the other creditors. It cannot be considered as a debt created in the administration of the estate.258

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tained against the heirs of a decedent, upon a decree rendered against the administrator alone, but must be based upon the original liability of the decedent.344

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Two execution creditors levied on and sold the same property of defendant Bourne. Appellant creditor, filed suit, charging improper motives, etc., of the other execution creditor. On motion of defendant, the sale under execution of appellant was set aside, April 6, 1869, and the sale under the execution of the other creditor was set aside April 14, 1869. Appellants filed an amended petition alleging that by virtue of their said levy, they acquired a lien on the property. The other creditor, Bourne, denying this lien by answer, set forth claim by virtue of levy of execution on same property at a different time, for another and different debt. Held under, volume 1, Sess. Acts 1867-8, p. 18, amending section 1, art. 16, ch. 36, Rev. St., appellant's lien, acquired by his levy, was not affected by the quashal of the sale thereunder.....529

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Franceway's request by two nephews and no one else than relatives were present. Franceway's wife was Nesbit's sister. Nesbit was not present when the deed was prepared and executed and it was lodged for record by the grantor and he retained the possession of the premises and listed same for taxation, and in this proceeding he employed and paid counsel to defend. Held, that these facts warrant the conclusion that the whole transaction was nothing more than a family arrangement intended to secure to Franceway and his wife the continued enjoyment of property and a fraud upon creditors.270

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I, J. Morgan Chinn, Clerk of the Court of Appeals of Kentucky, certify that the foregoing opinions are true and correct copies of opinions in the foregoing cases as appears from the records now on file in my office.

Given under my hand as Clerk aforesaid this 20th day of September, 1907.

J. MORGAN CHINN,
Clerk of Court of Appeals of Kentucky.



